

## A CONFLICT WITH OBLIVION: SOME OBSERVATIONS ON THE FOUNDERS OF LEGAL PRAGMATISM

Jerome Frank\*

"The enduring contributions of new schools of thought have been not the new theories they have defended, which have more often than not turned out to be erroneous, but the new questions they have put." Felix S. Cohen, *The Problems of a Functional Jurisprudence*.<sup>1</sup>

"For all of us, truth is born when we discover it. But intellectual genealogy is important. The history of ideas is essential to culture." Professor (now Mr. Justice) Felix Frankfurter, *Early Writings of Oliver Wendell Holmes, Jr.*<sup>1a</sup>

### I

The legal profession does not enjoy a reputation among laymen for undue modesty. Lawyers have not been backward in publicizing their contributions to government and to political thought. Yet, strangely, most lawyers have failed to assert, as they might, that from lawyerdom have emanated other kinds of ideas, once technically legal, which subsequently, in nonlegal form, have profoundly affected other thought-fields. Consider, for instance, the idea of "cause." It began as a legal notion in the Greek courts, where "cause" originally denoted "responsibility" or guilt; something of that meaning it long retained when it spread into scientific and philosophic discourse.<sup>2</sup> Helen Silving tells us that the "term 'facts' in the sense of realities (actual happenings) has its origin in the law and was thereafter adopted by other disciplines and common usages, and not vice versa, as is generally assumed."<sup>3</sup> Lon Fuller reminds us that "average"—which represents a crucial concept in modern physical science and in life insurance—"is a law word."<sup>4</sup> The "Socratic method" was transplanted from the methods of the courts. The legal, philosophic and scientific concepts

---

\* Judge, United States Court of Appeals, Second Circuit.

1. 1 MOD. L. REV. 5, 6 (1937). Felix Cohen did his best to underscore the value of pragmatism to lawyers. See his references to James, Peirce and Dewey in his brilliant articles, *Transcendental Nonsense and the Functional Approach*, 35 COL. L. REV. 809 at 826 (1935), and *The Problems of a Functional Jurisprudence*, 1 MOD. L. REV. 5, 8 (1937).

1a. 44 HARV. L. REV. 717-720 (1931).

2. Myers, *The Beginnings of Science in Science and Civilization* 7, 21-22 (Marvin ed. 1923); 1 JAEGER, *PAIDEIA* 159 (1939); Kelsen, *NATURE AND SOCIETY* 248, 263, 379, n. 97 (1943).

3. Silving, *Law and Fact in the Light of the Pure Theory of Law* in INTERPRETATIONS OF MODERN LEGAL PHILOSOPHIES 642, 644 (1947).

4. Fuller, *Legal Fictions*, 25 ILL. L. REV., 864, 907 (1931).

of "law" have often interacted.<sup>5</sup> The "logic of discovery" (or of "invention") has its roots in lawyers' techniques.<sup>6</sup>

Transplantations of ideas from one thought-realm to another have not always had fortunate results. The importation of rabbits into Australia and New Zealand had untoward consequences. So an idea, when transplanted from its native habitat, may take on new and unintended meanings which sometimes work harmfully. However, the process sometimes beneficently yields creative misunderstandings. But all that is another story (which I have elsewhere discussed).<sup>7</sup>

Our profession has ignored a striking modern instance of lawyers' important contributions to nonlegal thinking: Well-educated lawyers today accept it as a commonplace that the American philosophers known as Pragmatists have immensely influenced American legal thought in the last few decades.<sup>8</sup> It has, however, remained for two men who are not lawyers, Philip Wiener<sup>9</sup> and Max Fisch,<sup>10</sup> to demonstrate, recently, that the ideas of two American lawyers immensely influenced the American philosophers who founded Pragmatism, that indeed we must number those two lawyers among the founders of that distinctive American philosophy.

When one mentions "legal Pragmatism," one thinks at once of Holmes. But Wiener and Fisch have made it plain that another brilliant lawyer, a friend of Holmes, Nicholas St. John Green, deserves at least as much credit for the birth of Pragmatism in general and for legal Pragmatism in particular. Green was born in 1835; Holmes, six years later, in 1841. Green died, aged forty-one, in 1876; Holmes, aged ninety-three, in 1935 or fifty-nine years after Green's death. Green's published works were slender in volume, while Holmes' pub-

5. In primitive Greek thought (long before the advent of the Stoics) there occurred a carry-over of the idea of a moral (just) social human order (with the notion of irreparable retribution at its core) to the realm of physical (non-human) nature, so that the idea of physical "laws of nature" derived from that of "natural law." See, e.g., HARRISON, *THEMIS* (1911); CONFORD, *FROM RELIGION TO PHILOSOPHY* (1912); FRANK, *FATE AND FREEDOM* c. 10 (1945); KELSEN, *SOCIETY AND NATURE* c. 5 (1943). The idea of physical "laws of nature" later reacted on and reinforced the idea of "natural law." This leap-frogging of these ideas has recurred frequently. See, e.g., FRANK, *loc. cit.*; ZISEL, *Problems of Empiricism*, II INTERNAT. ENCYC. OF UNIFIED SCIENCE No. 8, 53, 61.

6. McKeon, *Democracy, Scientific Method and Action*, 55 *ETHICS* 235, 251-252 (1945); cf. ELLIOT, *THE WORK OF THE ADVOCATE* c. 2 (2d ed. 1911).

7. Frank, *Some Tame Reflections on Some Wild Facts* in *VISION AND ACTION* 56 (1953); see also Frank, *Book Review*, 25 *IND. L. J.* 231, 232, 233 (1950); FRANK, *FATE AND FREEDOM* 61 (1945).

8. See, e.g., FRIEDMANN, *LEGAL THEORY* 198 (3d ed. 1953); PATTERSON, *JURISPRUDENCE* c. 17 (1953); Coing, *Tendencies in Modern American Legal Philosophy*, 40 *Geo. L. J.* 523, 525 ff. (1952); Cowan, *A Report on the Philosophy of Law in the United States*, 50 *CALIF. L. REV.* 1086 (1950).

9. WIENER, *EVOLUTION AND THE FOUNDERS OF PRAGMATISM* (1949).

10. Fisch, *Justice Holmes, The Prediction Theory of Law, and Pragmatism*, 39 *J. OF PHIL.* 85 (1942); Fisch, *Alexander Bain and The Genealogy of Pragmatism*, 15 *J. OF HIST. OF IDEAS* 413 (1954).

lished efforts, including his judicial opinions, were voluminous. Perhaps these facts explain why contemporary lawyerdom knows virtually nothing of Green. No longer, however, should we lawyers leave it to non-lawyers alone to do Green the honor he merits. Except for a footnote reference in a legal treatise forty-eight years ago<sup>11</sup> and a few lines in Patterson's recent able discussion of the legal effects of Pragmatism,<sup>12</sup> Green has become the lawyers' forgotten man. Something should now be done in Green's behalf in his "conflict with oblivion."<sup>13</sup>

## II

William James in 1897 first gave currency to the name "Pragmatism."<sup>14</sup> As he ascribed the idea to his friend, the American scientist-philosopher C. S. Peirce, the latter is often hailed as the father of Pragmatism.<sup>15</sup> According to Peirce, that idea germinated in the discussions of a small informal group, the "Metaphysical Club," which met in Cambridge, Massachusetts, in 1870-1872.<sup>16</sup>

Just how this discussion group came into being we do not know. This we do know: James and Holmes, in their twenties, were close friends. Holmes then had a warm interest in philosophy and at one time contemplated teaching that subject. In 1868, James (aged 26) wrote from Berlin to Holmes (aged 27) proposing that when James returned to America they establish "a philosophical society to have regular meetings and discuss none but the tallest and broadest questions."<sup>17</sup> However that may be, the "Club" did meet for a few years in the early 1870's.

The members were James, Peirce, Chauncey Wright, Francis Ellingsworth Abbott, Holmes, John Fiske, Green and Joseph B. Warner. The last four, graduates of Harvard Law School, "practiced law." Green, Holmes and Warner also lectured for a time at Harvard Law School. In Harvard College, Green also "gave courses in philosophy (logic, metaphysics and psychology) and political economy."<sup>18</sup>

11. STREET, *FOUNDATIONS OF LEGAL LIABILITY* 273, n. 2 (1906).

12. PATTERSON, *JURISPRUDENCE* 475, 476 (1953).

13. This happy phrase I have borrowed from the title of ABBOTT's, *CONFLICTS WITH OBLIVION* (2d ed. 1935). He, in turn, acknowledges his debt to Sir Thomas Browne. Earlier, Sir Walter Raleigh had written of "the remediless oblivion of consuming time."

14. James, *Philosophical Conceptions and Practical Results*, published in the U. OF CAL. CHRONICLE in 1908 and reprinted in JAMES, *COLLECTED ESSAYS AND REVIEWS* 406 (1920).

15. Wiener suggests that the name derived from Kant's use of the phrase, "pragmatic belief." WIENER, *op. cit. supra* note 9, 23, 257, n. 29.

16. For most of the biographical material, I am indebted to the writings of Wiener and Fisch.

17. 1 JAMES, *LETTERS* 126 (1920).

18. WIENER, *op. cit. supra* note 9, 232.

Green taught at Harvard Law School in 1870-1873. He then left Harvard to teach at Boston University Law School during 1874-1875. He practiced law in Boston with General Benjamin Butler under whom he later served during the

In 1907, Peirce wrote several drafts of the genesis of Pragmatism as growing out of discussions at the Club:<sup>19</sup> ". . . Nicholas St. John Green," said Peirce, "was one of the most interested fellows [at the Club], a skillful disciple of Jeremy Bentham. His extraordinary power of disrobing warm and breathing truth of the draperies of long worn formulas, was what attracted attention to him everywhere. In particular, he often urged the importance of applying Bain's definition of belief as 'that upon which a man is prepared to act.' From this definition, pragmatism is scarce more than a corollary, so that I am disposed to think of him as the grandfather of pragmatism." In another draft, Peirce said that Green "was the grandfather of pragmatism." In still another, that Green "eloquently urged the importance of Bain's definition of belief as that upon which a man is prepared to act." And in yet another, Peirce states: "Green was especially impressed with the doctrines of Bain, and impressed the rest of us with them; and finally the writer of this brought forward what we called the principle of pragmatism. . . . The particular point that had been made by Bain, and impressed the rest of us, was the insistence that what a man really believes is what he would be ready to act upon, and to risk much upon."<sup>20</sup> Peirce narrates that, at the last meeting of the Club, apparently in November, 1872,<sup>21</sup> he read a "paper expressing some of the opinions I had been urging all along under the name of pragmatism," which was published in 1877-1878 in the *Popular Science Monthly*.<sup>22</sup>

In one of the articles, "How to Make Our Ideas Clear" (1878),<sup>23</sup> Peirce said that a belief, after appeasing "an irritation of doubt," involves "the establishment . . . of a rule of action, or, say for short, a habit." Thought "relaxes, and comes to rest for a moment when belief is reached." But "thought is essentially an action." Its "whole function is to produce habits of action." What "a thing means is simply what habits it involves. Now the identity of a habit depends on how it might lead us to act, not merely under such circumstances as are likely to arise, but under such as might possibly occur, no matter how

---

Civil War. When the war ended, Green "practiced by himself, with much success, until his death in 1876." Brooks Adams, who studied under him at Boston University Law School, said, "than Green, I never listened to a greater lecturer." An obituary notice read: "As a lawyer, Mr. Green had few equals. He argued some of the most intricate cases reported in the Massachusetts Reports."

19. For these several drafts see Fisch, *Alexander Bain and The Genealogy of Pragmatism*, 15 J. OF HIST. OF IDEAS 413 (1954).

20. See Fisch, 38 J. OF PHIL. at 92, n. 16 (1942).

21. Pragmatism, in Peirce's thinking, had also other sources. See, e.g., FEIBLEMAN, PEIRCE'S PHILOSOPHY (1946) *passim*.

22. Earlier, in 1871, Peirce wrote, "A . . . rule for avoiding the deceits of language is this: Do things fulfil the same function practically? Then let them be signified by the same word. Do they not? Then let them be distinguished." 113 NORTH AMERICAN REV. 469 (1871), quoted by Fisch, 39 J. OF PHIL. at 94, n. 20 (1942).

23. POPULAR SCIENCE MONTHLY (January 1878), reprinted in PEIRCE, CHANCE, LOVE, AND LOGIC 32 (Morris R. Cohen ed. 1923).

improbable they may be. What the habit is depends on when and how it causes us to act. . . . Thus, we come down to what is tangible and practical, as the root of every real direction of thought, no matter how subtle it may be; and there is no distinction of meaning so fine as to consist of anything but a possible difference of practice. It appears, then, that the rule for attaining . . . clearness of apprehension is as follows: Consider what effects, which might conceivably have practical bearings, we conceive the object of our conception to have. Then our conception of these effects is the whole of our conception of the object."<sup>24</sup>

Peirce uttered several other statements of what he meant by Pragmatism.<sup>25</sup> At one time he said, "Every statement you make to [an experimentalist] he will either understand as meaning that if a given prescription for an experiment ever can be given and ever is carried out, an experience of a given description will result, or else he will see no sense at all in what you say."<sup>26</sup> Once he said that pragmatism "is the sole principle of logic recommended by Jesus, 'Ye may know them by their fruits.'"<sup>27</sup> Again, he said that the meaning of a concept is to be found in "all the conceivable phenomena which the affirmation or denial of the concept could imply."<sup>28</sup> Elsewhere, he wrote that "the meaning of a proposition lies in the future," and hence "must be simply the general description of all the experimental phenomena which the assertion of the proposition virtually predicts."<sup>29</sup> Gallie sums up Peirce's definitions as follows: "To ask a person what he means by a word or formula is . . . to ask what he is prepared to do when he utters or accepts it. . . . [A] given word means its distinctive object only through expressing a distinctive procedure of action, expectation and adjustment."<sup>30</sup>

24. For the relation of these ideas to those of Bain, see Fisch, *Alexander Bain and The Genealogy of Pragmatism*, 15 J. OF HIST. OF IDEAS 413 (1954).

James, who came through the great crisis of his life—turning from suicidal despair to a zest for life's chancy adventures—said at the time (1870): "Today has furnished the exceptionally positive initiative which Bain posits as needful for the acquisition of habits." See THE PHILOSOPHY OF WILLIAM JAMES (*Introduction* by Kallen) 28, 29 (Kallen ed. 1925). Bain's idea was thereafter often rephrased by James. See, e.g., JAMES, THE WILL TO BELIEVE 54-55, 77-79, 84-85, n. 29 (1897).

Holmes, as late as 1925, echoed Bain and Green when, in a dissenting opinion, he said: "Every idea is an incitement. It offers itself for belief and if believed it is acted upon unless some other belief outweighs it. . . ." *Gitlow v. New York*, 268 U.S. 652, 672 (1925).

25. See, e.g., FEIBLEMAN, *op. cit. supra* note 21, 295-297.

26. Quoted by GALLIE, PEIRCE AND PRAGMATISM 18 (1952).

27. Quoted by FEIBLEMAN, *op. cit. supra* note 21, 300.

28. 15 MONIST 180 (1905), quoted by Morris Cohen in his *Introduction to PEIRCE, CHANCE, LOVE AND LOGIC* (1923).

29. Quoted by Dewey in his *Supplementary Essay to PEIRCE, CHANCE, LOVE AND LOGIC* 301, 303 (1923).

30. GALLIE, PEIRCE AND PRAGMATISM 15, 16, 17 (1952). See also M. R. COHEN, *INTRODUCTION TO LOGIC* 58 (1944).

In 1879, James wrote: "What is a conception? It is a teleological instrument. It is a partial aspect of a thing which for our purpose we regard as its essential aspect, as the representative of the entire thing."<sup>31</sup> In 1881, he said that the "essential function" of thinking "is the function of defining the direction which our activity, immediate or remote may have." Citing Peirce's 1878 article, James continued, "Indeed, it may be said that if two apparently different definitions . . . have identical consequences, those two definitions would be really identical definitions, made delusively to appear different merely by the different verbiage in which they are expressed."<sup>32</sup> In 1897 James said, "The truest . . . hypothesis is that which . . . 'works.'"<sup>33</sup> In 1898, James, for the first time, publicly spoke of Pragmatism. He credited to Peirce the authorship of the doctrine of "practicalism or pragmatism as I first heard him enunciate it at Cambridge in the '70's."<sup>34</sup> When in 1907 James gave a full-dress exposition of Pragmatism, he called it a "new name for some old ways of thinking."<sup>35</sup> The "pragmatic method," he said, ". . . is to try to interpret each notion by tracing its . . . practical consequences. What difference would it practically make to anyone if this notion rather than that were true? If no practical difference whatever can be traced, then the alternatives mean practically the same thing, and all dispute is idle. . . . A pragmatist . . . turns toward concreteness and adequacy, toward facts, toward action. . . . Theories thus become instruments. . . . Pragmatism . . . being nothing new, it harmonizes with many ancient philosophic tendencies. It . . . agrees . . . with utilitarianism in emphasizing practical aspects." The "pragmatic method means . . . only an attitude of orientation. The attitude of . . . looking towards . . . fruits, consequences."<sup>36</sup>

James' version of Pragmatism differed from Peirce's. For that reason, Peirce changed the name of his version to "Pragmaticism." The

31. Quoted by WIENER, *op. cit. supra* note 9, 123.

32. JAMES, REFLEX ACTION AND THEISM (1881) reprinted in JAMES, THE WILL TO BELIEVE AND OTHER ESSAYS IN POPULAR PHILOSOPHY 111, 124 (1897).

33. *Preface* to THE WILL TO BELIEVE 12 (1897).

That book was dedicated, "To my old friend Charles Sanders Peirce, to whose philosophic comradeship in old times and to whose writings in more recent years I owe more incitement and help than I can express or repay."

34. JAMES, PHILOSOPHIC CONCEPTIONS AND PRACTICAL RESULTS (1898), reprinted in JAMES, COLLECTED ESSAYS AND REVIEWS 406 (1920).

35. "There is absolutely nothing new in the pragmatic method. Socrates was adept at it. Aristotle used it methodically. Locke, Berkely and Hume made momentous contributions to truth by it. But these forerunners of pragmatism used it only in fragments: they were a prelude only." JAMES, PRAGMATISM 50 (1907).

Peirce said much the same. See FEIBLEMAN, *op. cit. supra* note 21, 299-300. As to Aristotle as a legal pragmatist, see Frank, *Modern and Ancient Legal Pragmatism*, 25 NOTRE DAME LAW. 207, 460 (1950).

36. JAMES, PRAGMATISM 45, 51, 53, 55 (1907). At 46, he cited and summarized a portion of Peirce's 1878 article.

differences between the two are important<sup>37</sup> but need not concern us here. For our present purposes, they are substantially the same.

But the views of the "founders of pragmatism" included far more than their definitions of the term. Wiener<sup>38</sup> has shown that all the "founders," each in his own way, were "evolutionary pragmatists." What they had in common was "a philosophical concern with the tremendous impact of evolution . . . on thinking." Wiener has given us a scintillating summary of the components of their common views.<sup>39</sup> Patterson has valuably applied Wiener's summary in an exposition of the ideas of the early lawyer-pragmatists.<sup>40</sup> I shall not here repeat what Wiener and Patterson have said but merely employ some of their insights, especially Wiener's:

These "founders" were "empirical pluralists." They shunned the resolution of divers problems by any single formula. A concept must be interpreted contextually; it has different meanings—consequences—under different conditions. This calls for "piece-meal" studies. The purpose for which they are used determines the significance, the relevance, of things, institutions, ideas. So these "founders" were also historical relativists, "temporalists." History breeds changes in meanings. The evolution of language, for instance, is important: There is a "relativity of mind to the changing linguistic conditions of behavior." Logical analysis must therefore be divorced from the study of origins, history. The value of an idea (or an ideal, or an institution) and its history are not identical. Yet its history may serve to disclose its present

37. See, e.g., GALLIE, *op. cit. supra* note 30, cc. 1 and 6; FEIBLEMAN, *op. cit. supra* note 21, 302 *et seq.* Peirce often charged James—and others—with twisting Peirce's version of Pragmatism. See, e.g., FEIBLEMAN, *op. cit. supra* note 21, 302–307.

For many years, and until his death, Peirce was indebted to James for "many kindnesses. And yet Peirce repudiated the Jamesian version while retaining his love and gratitude for James." FEIBLEMAN, *op. cit. supra* note 21, 28–29.

R. B. Perry says that "the modern movement known as pragmatism is largely the result of James' misunderstanding of Peirce." 2 PERRY, *THE LIFE AND THOUGHT OF WILLIAM JAMES* 409 (1935).

Kallen replies: "This talk is not borne out by the record. James never pretended to be a follower of Peirce's; he but too generously acknowledged a debt to Peirce for a concept whose verbal articulation he accepted from Peirce and which he consciously modified in the working out of his own vision. If James was silent about his differences from Peirce, it can hardly be because he was not aware of them; and it may be because Peirce was vocal enough about them." Kallen, *John Dewey and the Spirit of Pragmatism* in JOHN DEWEY: *PHILOSOPHER OF SCIENCE AND FREEDOM* 3, 16 (1950).

This seems a fair comment. James knew of Peirce's many difficulties and disappointments, of his failure to obtain a permanent teaching post or a publisher for most of his works, of Peirce's poverty. It may well be that, for those reasons, James allowed Peirce to scold him without answering back. Feibleman might better have said: James retained his affection for Peirce, and continued to help him, financially and otherwise, despite Peirce's many caustic comments on James' work.

38. WIENER, *op. cit. supra* note 9, c. 9.

39. WIENER, *op. cit. supra* note 9, c. 9.

40. PATTERSON, *op. cit. supra* note 12, c. 17.

disutility, disvalue. Pragmatism ("practicalism") combined history and analysis. These "founders," too, were sponsors of "fallibilism." They viewed all "empirical knowledge" as "contingent and fallible." Only experience (actual or potential) can furnish the materials for generalizations. "No knowledge transcends the uncertainty of empirical evidence."<sup>41</sup>

In the light of the foregoing, let us examine some of the writings of Green, the "grandfather of pragmatism." In 1870, several years before Peirce read his pragmatist paper to the Club, Green had published, in the *American Law Review*, an unsigned article, "Proximate and Remote Cause."<sup>42</sup> There, with a wealth of erudition, he narrated the genesis and history of that phrase, its shifts of meaning in differing contexts from Aristotle through the schoolmen to Lord Bacon's legal maxim, "*In jure non remota causa, sed proxima, spectatur.*" Green analyzed the ambiguous word "cause," revealing how its meaning changes with the purpose behind each of its particular uses. He explained that the courts, in applying Bacon's ambiguous maxim, did not do so logically but that they were guided by "experience." To comprehend Green's breadth and depth, one must read the entire article; so I have set it out in full as an Appendix to this paper.

At the moment, I want to note his exposition of "cause." He rejects the phrase, "chain of causation," as a "dangerous metaphor. . . . There is nothing in nature which corresponds" to it.

Such an idea is a pure fabrication of the mind. There is but one view of causation which can be of practical service. To every event there are certain antecedents, never a single antecedent, but always a set of antecedents, which being given the effect is sure to follow, unless some new thing intervenes to frustrate such a result. It is not any of these antecedents taken by itself which is the cause. . . . The true cause is the whole set of antecedents. Sometimes also it becomes necessary to take into account, as part of the antecedents, the fact that nothing intervened to prevent the antecedents from being followed by the effect. But when a cause is to be investigated for any practical purpose, the antecedent which is within the scope of that purpose

---

41. Most of the "founders," especially James, Holmes and Peirce, maintained that men developed aims, desires and ideals, of the highest worth, not resulting from their utility and not serviceable in the struggle for survival. See, e.g., JAMES, *THE MORAL PHILOSOPHER AND THE MORAL LIFE* (1891) reprinted in JAMES, *THE WILL TO BELIEVE* 184, 187-189 (1897); HOLMES, *ADDRESS* (1902) reprinted in HOLMES, *COLLECTED LEGAL ESSAYS* 272 (1920). As to Peirce, see FEIBLEMAN, *op. cit. supra* note 21, 374, 375, 377.

In part because of this attitude, James came to regret the name "Pragmatism," since it played into the hands of critics who, without carefully reading what he and other pragmatists had actually written, asserted that Pragmatism was concerned with "the immediate workings" of ideas "in the physical environment, enabling" men "to make money or gain some similar 'practical' advantage." JAMES, *THE MEANING OF TRUTH* 180-216 (1909).

42. 4 AM. L. REV. 201 (1870), reprinted in GREEN, 1 *ESSAYS ON TORT AND CRIME* (1933). As to the present pertinence of this article, see *Hentschel v. Baby Bathinette Corp.*, 215 F.2d 102, 106 n. 7 (2d Cir. 1954) (dissenting opinion).



is singled out and called the cause, to the neglect of the antecedents, which are of no importance to the matter in hand.<sup>43</sup> . . . What one of the various circumstances necessary to the death of a man [who has been drowned] shall we single out as the cause, to the neglect of the other circumstances, depends upon the question for what purpose we are investigating the death. For each different purpose with which we investigate we shall find a different circumstance, which we shall then intelligibly and properly call the cause. . . . A medical man may say that the cause of his death was suffocation by water entering the lungs. A comparative anatomist may say that the cause of death was the fact that he had lungs instead of gills like a fish. . . . From every point of view from which we look at the facts, a new cause appears. In as many different ways as we view an effect, so many different causes, as the word is generally used, can we find for it. . . . In physical science there is a search for what may with some propriety be called the proximate cause. It is a search for the conditions immediately antecedent to and concomitant with the effect. . . . The word proximate, in such an inquiry . . . is not an absolute but a relative term. It signifies the nearest known cause considered in relation to the effect, in contrast to some more distant cause. In the law there is no such investigation as this. The law, in the application of this maxim, is not concerned with philosophical or logical views of causation. When the maxim is applied, the whole body of facts has been ascertained by testimony. The facts are the subject of inquiry for a single purpose. That purpose is to determine the rights and liabilities of the respective parties to the proceedings. Those facts alone are viewed as causes and effects, which have a direct bearing upon those rights and liabilities. . . . The inquiry is often one of difficulty. . . . One difficulty is that philosophy and metaphysics are sometimes brought into a discussion to which they do not belong. Another is that cause and effect are often viewed as parts of a "chain of causation," and the discussion thus becomes meaningless. The chief difficulty, however, is that the term proximate and the term remote have no clear, distinct, and definable significations. . . . The division is neither scientific nor logical. . . . Above all, it is not a fixed and constant division. It varies in different classes of action. The same cause and effect which would be considered proximate in one class of actions, the attendant circumstances being the same, would be considered remote in another. The meaning of the terms, proximate and remote, is contracted or enlarged, according to what is the subject matter of the inquiry.

So Green wrote in 1870. Unaware of his essay, lawyers and philosophers, in the twentieth century, have said the same without bettering Green. I refer to such as Haldane,<sup>44</sup> Morris Cohen,<sup>45</sup> Felix Cohen,<sup>46</sup> Cardozo,<sup>47</sup> and Edgerton.<sup>48</sup>

43. In 1879, James said: "Every way of classifying a thing is but a way of handling it for a particular purpose." JAMES, *THE SENTIMENT OF RATIONALITY* (1879) reprinted in JAMES, *THE WILL TO BELIEVE* 63, 70 (1897).

44. HALDANE, *THE REIGN OF RELATIVITY* 121-2 (1921).

45. MORRIS COHEN, *THE MEANING OF HUMAN HISTORY* 96-97, 105-106 (1947).

46. Felix Cohen, *Field Theory and Judicial Logic*, 59 *YALE L.J.* 238, 252-259 (1950).

47. CARDOZO, *PARADOXES OF LEGAL SCIENCE* 83-85 (1928).

48. Edgerton, *Legal Cause*, 72 *U. OF PA. L. REV.* 211, 343 (1924).

It is worth noting that, related to Green's rejection of a "chain of causation," and his reference to "some new thing that intervenes to frustrate antecedents from being followed by an effect," are the following: Peirce (in part echoing Aristotle, and in part influenced by Maxwell's idea of "statistical laws," Darwin's "chance variations," and "evolution"), asserted the objective reality of chance. So did James, after his own fashion. Both Peirce and James also declared that no scientific "law" could be exact. Somewhat akin was Chauncey Wright's idea of "cosmical weather,"<sup>49</sup> an idea which affected Holmes and which he never forgot.<sup>50</sup>

So much for Green as one of Pragmatism's founders. I now turn to Green as a founder of "legal Pragmatism" and his influence on Holmes.

### III

In a letter written in 1927, Holmes said that, as a young man, he had learned more from Green and Wright than from Peirce.<sup>51</sup> In 1871, in an unsigned review<sup>52</sup> of a book on torts which Green had (anonymously) abridged, Holmes had referred to Green, but not by name: "We long for the day when we may see these subjects [some aspects of torts] treated by a writer capable of dealing with them philosophically, and self-sacrificing enough to write a treatise as if it were an integral part of a commentary on the entire body of law. Such a result might be anticipated if the able lecturer for whose use this abridgement was prepared, and who is achieving so deserved a success at Cambridge, should apply subtle and patient intellect to the task."

---

49. See WRIGHT, *A PHYSICAL THEORY OF THE UNIVERSE* (1864) reprinted in WRIGHT, *PHILOSOPHICAL DISCUSSIONS* 1, 11 (1876).

The term "cosmical weather" has been variously interpreted:

(1) James wrote: "The physical order of nature, taken simply as science knows it, cannot be held to reveal any one harmonious intent. It is mere *weather*, as Chauncey Wright called it, doing and undoing without end." JAMES, *IS LIFE WORTH LIVING?* (1895) reprinted in JAMES, *THE WILL TO BELIEVE* 32, 52 (1897).

(2) Morris Cohen wrote of "Wright's doctrine of accidents and 'cosmic weather' which maintained against La Place that a mind knowing nature from moment to moment is bound to encounter genuine novelty in phenomena, which no amount of knowledge would enable us to foresee." M. R. COHEN, *Introduction to PEIRCE, CHANCE, LOVE AND LOGIC* 19, n. 11 (1923).

(3) WIENER, *op. cit. supra* note 9, 5, 94: Wright's "apt expression for . . . empirical diversity, 'cosmic weather,' did not imply any inherent ontological indeterminism in things themselves, but rather a radical pluralism grounded in the complexity of nature and in man's many-sided evolved interests, practical, aesthetic, and scientific. . . ." "He denied both the absoluteness of natural law and the infallibility of human knowledge."

50. In 1929, Holmes wrote to Pollock: "Chauncey Wright . . . taught me when young that I must not say necessary about the weather, that we don't know whether anything is necessary or not." 2 HOLMES—POLLOCK LETTERS 252 (1941).

51. See Fisch, *Alexander Bain and The Genealogy of Pragmatism*, 15 J. OF HIST. OF IDEAS 414, n. 6 (1954).

52. 5 AM. L. REV. 340 (1871).

In 1873, Holmes briefly praised<sup>53</sup> an unsigned article on "Slander and Libel" by Green, published in 1872.<sup>54</sup> Except for these three comments, Holmes seems never to have mentioned or cited Green. Yet it is clear that Green's writings anticipated Holmes in several most important respects.

Holmes' *Common Law* was published in 1881. Its first paragraph contains what many consider his most famous utterance: "The life of the law has not been logic: It has been experience." What did he mean by that aphorism? This we learn in subsequent pages of that book where, discussing the foreseeability standard in crimes and torts, he says repeatedly that the courts, in applying that standard, resort to "experience."<sup>55</sup> Perhaps Holmes' most explicit explanation of what he meant by "experience" occurs in his exposition of negligence. After stating that one is liable for the consequences of "whatever a prudent and intelligent man would have foreseen," he says that "the next question is how to determine the circumstances necessary to be known in any given case in order to make a man liable for the consequences of his act. They must be such as would have led a prudent man to perceive the danger. But this is a vague test. How is it decided what those circumstances are? The answer must be, by experience."<sup>56</sup> In the following pages, Holmes repeats this notion. He declares "that experience is the test by which it is decided whether the degree of danger attending given conduct under certain known circumstances is sufficient to throw the risk upon the party pursuing it."<sup>57</sup> He writes, "The question what a prudent man would do under given circumstances is then equivalent to the question what are the teachings of experiences as to the dangerous character of this or that conduct under these or those circumstances. . . ."<sup>58</sup> He remarks, "The tendency of a given act to cause harm under given circumstances must be determined by experience."<sup>59</sup>

Let us look, now, at Green's article, "Proximate and Remote Cause," published in 1870 or eleven years before the publication of Holmes' great book. There Green, after (as above noted) giving an

53. See a note by Holmes in the 12th edition of 2 KENT COMMENTARIES 21, n. 1(b) (1873).

54. 6 AM. L. REV. 593 (1872), reprinted in GREEN, ESSAYS ON TORT AND CRIME 49 (1933).

55. HOLMES, THE COMMON LAW 56, 117, 123, 125, 147, 149, 150, 152, 154, 158, 162, 312 (1881).

56. *Id.* at 147.

57. *Id.* at 149.

58. *Id.* at 150.

59. *Id.* at 162.

In discussing crimes, he says that "the question of what might have been foreseen is determined by the standard of the prudent man, that is, by general experience. . . . The reason for this limitation is simply to make a rule which is not too hard for the average member of the community. As the purpose is to compel men to abstain from dangerous conduct, and not merely to restrain them from evil inclinations, the law requires them at their peril to know the teachings of experience, just as it requires them to know the law." *Id.* at 56-57.

exposition of the history and meaning of the maxim concerning "proximate cause," and its uses in philosophy and science, goes on to say: "*The law, in the application of this maxim, is not concerned with philosophical or logical views of causation.*" The courts' "division" between "proximate" and "remote" is "neither scientific nor logical." Here, surely, is an anticipation of Holmes' rejection of "logic" as the "life of the law." But now what, according to Green, does the "law" employ in place of logic? "In actions for negligence," he says, "a defendant is held liable for the natural and probable consequences of his misconduct. In this class of actions his misconduct is called the proximate cause of those results which a prudent foresight might have avoided. . . . *Experience . . . teaches* us that various effects, which we can foresee with a greater or less degree of certainty, will or may follow from our own acts. The law makes us responsible for those effects of voluntary acts which might reasonably have been foreseen, or which are of a kind analogous to the effects which might thus have been foreseen. There is generally no other way of determining whether certain events, or whether events analogous to them in kind, were or might have been anticipated or foreseen, than by an *appeal to experience.*" (Emphasis added.)

It would be absurd to charge Holmes with plagiarism. As one who has long been one of Holmes' most ardent admirers,<sup>60</sup> I would be the last to suggest it. But, since he was editor of the *American Law Review* in 1870 when it published Green's "Proximate Cause" article, it would seem scarcely deniable that he was well acquainted with it and that from Green he borrowed, unconsciously,<sup>61</sup> an idea which became a basic tenet of Holmes' legal philosophy. True, Holmes elaborated this idea with genius, made it his own, followed up its implications fruitfully as Green had not.<sup>62</sup> Yet one may fairly say that Green was the grandfather not only of Pragmatism in general but of legal Pragmatism as well.

In an unsigned article by Green published in 1871, he speaks of the "difficulty of drawing a line," as a "difficulty which is continually recurring in law, and which pervades all matters of human investigation. All things in nature, all things external, all ideas, all sensations, all emotions, shade into each other by imperceptible degrees. No absolute lines can be drawn. Things are separated from one another by a debatable ground. The difficulty is inherent in the nature of man. Human power can make but an approach to precision. It is the ancient puzzle of the Sophists concerning the heap of sand. One throws down a little sand. When does it become a heap? Was it by the addition

60. See FRANK, *LAW AND THE MODERN MIND* 253-260 (1930).

61. Cf. LOWES, *THE ROAD TO XANADU* (1927); 1 JONES, *THE LIFE AND WORK OF SIGMUND FREUD* 371 *et seq.* (1953). See the remarkable discussion of "repersonalization" in 1 KALLEN, *ART AND FREEDOM* 17-18 (1942).

62. See, e.g., HOLMES, *THE COMMON LAW* 35-37, 338 (1881).

of the fiftieth or the one hundred and fiftieth grain? The question cannot be answered satisfactorily; there must be a margin of doubt."<sup>63</sup>

Note the following phrases in that passage: In drawing lines, "there must be a margin of doubt." "Human power can but make an approach to precision." "Absolute lines" are difficult to draw concerning "*things in nature*" as well as in "law." "Things are separated from one another by a *debatable ground*." See, now, Holmes' discussion of line-drawing in 1881, in his *Common Law*: "*Legal, like natural divisions, however clear in their general outline, will be found on exact scrutiny to end in a penumbra or debatable land.*"<sup>64</sup> Elsewhere in the same book, Holmes expressed that idea in pungent phrases.<sup>65</sup> In later years, it became one of his favorite themes, and he expressed it masterfully.<sup>66</sup> But that he borrowed it from Green it is difficult to deny.

63. Green, *Insanity in Criminal Law*, 5 AM. L. REV. 704 (1871), reprinted in GREEN, *ESSAYS ON TORT AND CRIME*, 160, 166-167 (1933).

Seventeen years later, Chitty, J., said in *Lavery v. Pursell*, 39 Ch. D. 508, 517 (1888): "Courts of justice ought not to be puzzled by such old scholastic questions as to where a horse's tail begins and where it ends. You are obliged to say, 'This is a horse's tail,' at sometime."

64. HOLMES, *THE COMMON LAW* 127 (1881). (Emphasis added.)

See also Holmes' unsigned article, *The Theory of Torts*, 7 AM. L. REV. 652, 654 (1873). There he said that the distinction is "philosophical."

65. See 68, 110, 127, 128, 158.

66. See, e.g., *Haddock v. Haddock*, 201 U.S. 562, 631-632 (1906); *Hudson Water Co. v. McCarter*, 209 U.S. 349, 355 (1908); *Le Roy Fibre Co. v. St. Paul*, 232 U.S. 340, 354 (1914); *Bullen v. Wisconsin*, 240 U.S. 625, 630-631 (1916); *Irwin v. Gavitt*, 268 U.S. 161, 168 (1925); *Schlesinger v. Wisconsin*, 270 U.S. 230, 241 (1926); *Empire Trust Co. v. Cahan*, 274 U.S. 473, 478 (1927); *Louisville Gas & Electric Co. v. Coleman*, 277 U.S. 32, 41 (1928); *Quaker City Cab Co. v. Pennsylvania*, 277 U.S. 389, 403 (1928); *Superior Oil Co. v. Mississippi*, 280 U.S. 390 (1930).

In his unsigned article, 7 AM. L. REV. 652, 654 (1873) Holmes had said that "it is better to have a line drawn somewhere in the penumbra between darkness and light than to remain in uncertainty."

In 1857, Lord Cranworth had said in *Boyse v. Rossborough*, 6 H.L.C. 2, 45 (1857), "The difficulty to be grappled with arises from the circumstance that the question is almost always one of degree. There is no difficulty in the case of a raving madman or a drivelling idiot, in saying that he is not a person capable of disposing of property. But between such an extreme case and that of a man of perfectly sound and vigorous understanding, there is every shade of intellect, every degree of mental capacity. There is no possibility of mistaking midnight for noon; but at what precise moment twilight becomes darkness is hard to determine." (Emphasis added.)

In 1875, in *Hobbs v. L. & S.W. Ry.*, L.R. 10 Q.B. 111, 121 (1875), Blackburn, J. remarked, concerning the rule in *Hadley v. Baxendale*, "It is a vague rule. . . . [I]t is something like having to draw a line between night and day; there is a great duration of twilight when it is neither night nor day; but on the question now before the court, though you cannot draw the precise line, you can say on which side of the line the case is. . . ."

In 1899, Holmes wrote, "In our approach towards exactness we constantly tend to work out definite lines or equators to mark distinctions which we first notice as different poles. . . . There is a difference manifest at the outset between night and day. The statutes of Massachusetts fix the dividing points at one hour between sunrise, ascertained according to mean time. When he has discovered that a difference is a difference of degree, that distinguished extremes have between them a penumbra in which one gradually shades into the other, a tyro thinks to puzzle you by asking when you are to draw the line, and an advocate of more experience will

In 1872, Green published an article, "Slander and Libel."<sup>67</sup> He discussed the doctrine that "to constitute slander, the speaking of the words must be with malice" but that, absent a legal excuse, "the law implies malice from the act of speaking and will not admit evidence to the contrary." Green commented: "Why is it not as simple to say that speaking defamatory matter without legal excuse is actionable as to say defamatory matter must be malicious, but the law implies malice? What need is there of bringing into the law of slander the cumbrous machinery of malice for the sole purpose of constructing other machinery—the machinery of legal implication—to take it out again? If legal malice means the want of legal excuse, which appears to be the most approved definition of it, then it means so much that it means nothing, for in that sense every act which is the groundwork of an action is malicious."

In 1873, Holmes wrote in praise of Green's 1872 article.<sup>68</sup> Nine years later, Holmes, in his *Common Law*, without citing Green, writes of "the law of slander" that "It has often been said that malice is one of the elements of liability, and the doctrine is commonly stated this way: that malice must exist, but that it is presumed by law from the mere speaking of the words. . . ." He goes on to say that this "is not so," and that the word "malice" is superfluous.<sup>69</sup> And he also remarks, "Whenever it is said that a certain thing is essential to liability, but that it is conclusively presumed from something else, there is always ground for the suspicion that the essential element is to be found in that something else, and not in what is said to be presumed from it."<sup>70</sup>

Green, in his 1872 article, explained historically how the English judges "introduced into the law of slander" the "meaningless" doctrine of "implied malice": The ecclesiastical courts, having taken over from "Roman law" the concept that *animus* as an intention to do wrong was necessary in defamation cases, imbued it, under the label *malitia*, with moral notions of evil doing. The defendant was punished for the salvation of his soul (*pro saluti animae*) "and the matter was looked at not in a legal, but in a moral point of view, to see if the speaking was a sin." When the common law courts assumed jurisdiction of defama-

---

show the arbitrariness of the line proposed by putting cases very near it on one side or the other. But the theory of the law is that such lines exist, because the theory as to any possible conduct is that it is either lawful or unlawful. As that difference has no gradation about it, when applied to shades of conduct that are very near each other it has an arbitrary look. We like to disguise the arbitrariness, we like to save ourselves the trouble of nice and doubtful discrimination." Holmes, *The Path of the Law*, 12 HARV. L. REV. 443 (1899), reprinted in HOLMES, COLLECTED LEGAL PAPERS 210, 232-233 (1920). Holmes repeated much of this statement in *Louisville Gas Co. v. Coleman*, 277 U.S. 32, 41 (1928).

67. 6 AM. L. REV. 593 (1872), reprinted in GREEN, ESSAYS ON TORT AND CRIME 49 (1933).

68. See 2 KENT, COMMENTARIES 21, n. 1(b) (12th ed. 1873).

69. HOLMES, THE COMMON LAW 138 (1881).

70. *Id.* at 134.

tion, they "affirmed that malice was in all cases necessary to maintain the action, and to find a malice which did not exist they implied it." They spoke as if "a legal duty is a moral duty."

In showing the historical beginnings of the "implied malice" doctrine in a "*moral point of view*," which the courts preserved verbally but actually abandoned, once more Green was Holmes' precursor: In his *Common Law*, Holmes maintained that the "law . . . starting from the moral ground . . . , works out an external test": that "the tendency of the law everywhere is to transcend moral and reach external standards"; that usually it is "wholly indifferent to the internal phenomena of conscience"; and that "although the law starts from the distinctions and uses the language of morality, it necessarily ends in external standards not dependent on the actual consciousness of the individual."<sup>71</sup>

Green, as a follower of Bentham, sought to reform legal doctrines in the interest of "utility" or social welfare. But he went Bentham one better by employing legal history (the "growth" of the "law") and anthropology<sup>72</sup> to reveal the folly of retaining legal doctrines, and terminology, lacking in current social utility. In this respect, his article on "Married Women," published (unsigned) in 1872,<sup>73</sup> is a masterpiece. So, too, his "Slander" article (1871). There he said: "As the English law upon any subject was never constructed upon a plan, it cannot be resolved into one. It is a mass which has grown by aggregation, and special and peculiar circumstances have, from time to time shaped its varying surfaces and angles. Undoubtedly the crooked and wrenched form of the law of slander and libel can be accounted for in the way we account for the distorted shape of a tree—by looking for the special circumstances under which it has grown, and the forces to which it has been exposed." Green's combination of a Benthamite social "utility" attitude and the study of historical evolution—how "law" has "grown"—is another instance in which he served as Holmes' forerunner.<sup>74</sup> An

71. *Id.* at 110, 135, 137, 324; see also 79-80, 161-162.

In 1893, Holmes discussed, much as Green had done, the ecclesiastical origin of "malice" in defamation cases. See *Hanson v. Globe Newspaper Company*, 159 Mass. 293, 299, 34 N.E. 462 (1893) (dissenting opinion).

72. See his article, *Married Women*, 6 AM. L. REV. 57 (1872), reprinted in GREEN, *ESSAYS ON TORT AND CRIME* 31 (1933).

73. 6 AM. L. REV. 57 (1872).

74. In 1873 Chauncey Wright,—then an intimate friend of Green—writing of the evolution of language, said: "The case is parallel to the development of legal usages or principles of judicial decisions. The judge cannot rightfully change the laws that govern his judgments; and the just judge does not consciously do so. Nevertheless, legal usages change from age to age. Laws, in their practical effects, are ameliorated by courts as well as by legislatures. No new principles are consciously introduced; but interpretations of old ones, and combinations, under more and precise and qualified statements, are made, which disregard old decisions, seemingly by new and better definitions of that which in its nature is unalterable, but really, in their practical effects, by alterations, at least in the proximate grounds of decision; so that nothing is really unalterable in law, except the intention to

obituary editorial on Green, probably written by John Chipman Gray, and published in 1876, said: "He handled a question of law not only with the mastery of a logician . . . but also, and with equal power, in the light of the history which explains those principles, and the considerations of political science and human nature which justify them."<sup>75</sup> An 1889 article reported that "his weakness, if he had any, as an instructor, was his contempt for the maxim *stare decisis*. He loved to attack adjudications."<sup>76</sup> In 1873, Green had said, "Law is always in a state of change. Like the river of Heraclitus, it is not twice the same."<sup>77</sup>

In the spirit of Green, Holmes wrote in 1881, "The law [as to liability in tort] did not begin with a theory. It has never worked one out."<sup>78</sup> "The history of what the law has been is necessary to the knowledge of what the law is. . . . When we find that . . . the various grounds of policy on which various rules have been justified are later inventions to account for what in fact are survivals from primitive times, we have a right to reconsider the popular reasons, and, taking a broader view of the field, to decide whether those reasons are satisfactory."<sup>79</sup>

I repeat that Holmes must not be charged with plagiarism. Lindey refers to "unconscious reproduction:—a phrase is retained in memory . . . and is reproduced without any consciousness that it is not original. . . . It's easy enough to set down a phrase, a paragraph, a simple image, a few musical notes, without knowing they're borrowed." He quotes Poe thus: "What the poet intensely admires becomes in very fact . . . a portion of his own intellect. It has a secondary origination within his own soul, although springing from its primary origination from without. . . . [T]he frailest association will regenerate it—it springs up with all the vigor of a new birth—its originality is not even a matter of suspicion—and when the poet has written and printed it, and on its account is charged with plagiarism, there will be no one in the world more astounded than himself." Lindey tells how James Russell Lowell in 1868 was amazed when William Dean Howells ". . . pointed out . . . that a poem Lowell had penned was virtually identical with one [written by another poet] that had adorned the pages of the *Atlantic Monthly* two years before. . . ."<sup>79a</sup>

---

do justice under universally applicable principles of decision, and the instinctive judgments of so-called natural law." WRIGHT, *PHILOSOPHICAL DISCUSSIONS* 258 (1877) reprints this article.

75. 11 AM. L. REV. 174 (1876).

76. 1 GREEN BAG 54, 57 (1889).

77. Green, *The Three Degrees of Negligence*, 8 AM. L. REV. 649 (1874), reprinted in GREEN, *ESSAYS ON TORT AND CRIME* 92 at 105 (1933).

78. HOLMES, *THE COMMON LAW* 77 (1881).

Compare this with Green's words in 1871, quoted at length above: "As the English law upon any subject was never constructed upon a plan, it cannot be resolved into one. It is a mass which has grown by aggregation, etc."

79. HOLMES, *THE COMMON LAW* 37 (1881).

79a. Lindey, *Plagiarism and Originality*, 252-253 (1952). See also at 185.



In 1869, Green said of Hobbes that he "had a marvelous facility for stripping words of their ambiguity," a "pragmatic" power, it will be recalled, which Peirce ascribed to Green. Green displayed this "faculty" remarkably in his 1871 article on slander. He exercised this semantic skill in other writings.<sup>80</sup> Holmes, our leading legal semanticist,<sup>81</sup> was not, then, the first legal pragmatist to till that field.

Wiener points to some other examples of the way Green anticipated Holmes.<sup>82</sup> Outstanding is the following: In 1871, Green wrote:<sup>83</sup> "The physician deals with a single individual as his patient, and has nothing to do with the community or the interests of the community. If he has an insane patient, his whole attention is given to this particular cure without looking beyond. . . . But law is made for the protection of society. It is for the community and not for the individual; except as through the individual it may affect the community, and promote the safety of society at large. The defendant in a criminal case is not a patient whose moral and physical health is the sole object of solicitude. The object of punishment is to prevent not only the defendant, but all other persons, from violating the law." In 1881, Holmes

80. See, e.g., GREEN, *ESSAYS ON TORTS AND CRIME* 146, 177, 181, 198 (1933).

81. See Frank, *A Lawyer Looks at Language* in HAYAKAWA, *LANGUAGE IN ACTION* 322, 329 (1941).

82. WIENER, *op. cit. supra* note 9, 164-165. He refers, *inter alia*, to the way, first Green and then Holmes, used what Wiener terms "a quasi-behavioristic method of ascertaining intention": Green, in 5 AM. L. REV. 704 (1871) (*ESSAYS ON TORT AND CRIME* at 165) said, "But no direct evidence of intent is possible. An intention of the mind is an idea; it cannot be perceived by the senses; it can only be inferred from acts." In 14 AM. L. REV. 1 (1880) Holmes said, "The law only works within the realm of the senses." In *THE COMMON LAW*, Holmes made that theme—the "objective" theory of liability—central.

Pollock, in 1931, said: "Mr. Justice Holmes did not invent the external standard of prudence or discover the Reasonable Man. They may be traced through our medieval sages and the canonists to the classical Roman lawyers, back to the Greek philosophers, especially the Stoics, and ultimately to Aristotle; and the doctrine was enounced in practical form by English judges of the nineteenth century, to whom due honour is rendered in *The Common Law*. But Holmes was the first to perceive the far-reaching importance of the doctrine and to set it forth in an orderly and convincing exposition." Pollock, *Mr. Justice Holmes*, 44 HARV. L. REV. 693, 695 (1931). For a typical English nineteenth-century statement, see Tindal, C. J., 3 Bingham N.C. 468 (1837); cf. *Blyth v. Birmingham Waterworks Co.*, 11 Exch. 781, 784 (1856).

In *THE COMMON LAW* 48, Holmes said the "objective" (external standard) theory did not rest on the "difficulty of proof" of subjective intent. See also his opinion in *Comm. v. Pierce*, 138 Mass. 165 (1884). But in *Silsbee v. Webber*, 171 Mass. 378, 380, 50 N.E. 555 (1898) he seems to have changed his mind.

I happen to agree with Corbin that Holmes carried the "objective" theory too far in respect of contracts. See, e.g., 3 CORBIN, *CONTRACTS* 84, n. 96 (1951); *Zell v. American Seating Co.*, 138 F.2d 641, 646-648 (2d Cir. 1943); *Ricketts v. Penna. R. Co.*, 153 F.2d 757, 760 (2d Cir. 1946) (concurring opinion).

HALL, *GENERAL PRINCIPLES OF CRIMINAL LAW* 169-187, 347-350 (1947) criticizes Holmes "objective" theory relative to crimes and suggests that Holmes did not apply it consistently.

83. 5 AM. L. REV. 704 (1871) reprinted in GREEN, *ESSAYS ON TORT AND CRIME* 161, 167 (1933).

wrote:<sup>84</sup> "The standards of the law are standards of general application. The law takes no account of the infinite varieties of temperament, intellect and education which makes the internal character of a given act so different in different men. It does not attempt to see men as God sees them. . . . [W]hen men live in a society, a certain average of conduct, a sacrifice of individual peculiarities beyond a certain point, is necessary to the general welfare."

Green, then, was, in several notable respects, Holmes' precursor. But it will not do to leave the matter there. As I have said elsewhere, "Who, in most instances, can describe with accuracy the 'influences' which move men? What they have read often has some effect. But men, particularly when creative, do not merely reproduce the thoughts of others. Those thoughts may be provocative, stimulative. The stimulus, however, may not result in imitation but in originality. It is the pedant, lacking originality himself, who assumes that there is nothing new under the sun, that new ideas are simply the mechanical equivalent of older ideas. Creation is more chemical than mechanical or mathematical. There are psychological, as well as biological, 'sports,' mutations. Coleridge reads the narratives of English sea voyages; there emerges, as Lowes has shown, a poem containing, it is true, precise phrases taken from those tales, but built into a work of art which is far more than the mere product of those words. Veblen, as Dorfman discloses, scans the pages of anthropologists and sociologists; no one would say that his *Theory of the Leisure Class* is any mere copy of what his predecessors had said, although their ideas undoubtedly goaded his thinking. New wine goes into old bottles, but the important fact is not the antiquity of the bottles. More than that, often the bottles themselves are new and only the antique labels remain."<sup>85</sup>

So with Holmes. He not only enlarged on Green. In *The Common Law*, Holmes added eminently novel and invaluable ideas of his own. He made explicit a theme at which Green had done little more than hint—the role of conscious and unconscious notions of, or feelings about, public policy in the judicial development of doctrines.<sup>86</sup> He fused ideas he borrowed so that they acquired a new, vital, significance.

---

84. HOLMES, *THE COMMON LAW* 108 (1881); see also 48–51.

85. FRANK, *IF MEN WERE ANGELS* 234 (1942). See also Frank, *Sketch of an Influence* in *INTERPRETATIONS OF MODERN LEGAL PHILOSOPHIES* 189, 218, 237–238 (1947).

86. Professor (now Mr. Justice) Frankfurter referred thus to another use by Holmes of the "unconscious": "In his analysis of judicial psychology, Holmes was conscious of the role of the unconscious a generation before Freud began to re-orient modern psychology." Frankfurter, *The Early Writings of Oliver Wendell Holmes, Jr.*, 44 *HARV. L. REV.* 717, 718 (1931).

But Dr. Oliver Wendell Holmes had often dealt with the "unconscious" long before his son wrote anything, and Dr. Holmes had many predecessors. See, e.g., NORTHBRIDGE, *MODERN THEORIES OF THE UNCONSCIOUS* c. 1 (1924).

And, although he owed much to Green and others,<sup>87</sup> he made a major contribution, as a legal pragmatist, which (so far as I can discover) was wholly original—his “prediction theory” of “law.”

87. Among others, Maine, Tylor, Dr. Oliver Wendell Holmes, Wright, James and Ihering.

*Holmes and Ihering:* In *THE COMMON LAW*, Holmes cited, several times, Ihering's *SPIRIT OF THE ROMAN LAW*. But he did not cite or quote passages in Ihering's book relative to the way in which the ancient Roman jurists bent “the rules of logic” and, as a “matter of policy,” by “a silent conspiracy,” would “twist and turn” the literal language of statutes in order to meet “practical interests,” the “needs of practical life,” the “interests and needs of the time,” whenever “the law” became “out of date.” Ihering said that, “though professing to be merely explanations,” these interpretations “in fact, were a change and development of the law in accordance with the spirit of the time”; that the Roman jurists, “with all their reverence for the letter” of the law, “had too sound a sense to sacrifice to it their own convictions and practical interests”; that they sought to “adapt” the letter “to the wants of life”; that these adaptations were “justifiable, even necessary”; and that “the impulse to this . . . corruption [of the texts] proceeded not from them but from the people.” See a “condensed translation,” published in 1880, of a portion of Ihering's book, by W. G. Hammond in an Appendix to the third edition of *LIEBER, LEGAL AND POLITICAL HERMENEUTICS* 262–275 (1880). Compare that translation with *HOLMES, THE COMMON LAW* 1, 5, 35, 36 (1881).

*Holmes and James:* Holmes, in 1919, made his famous statement, when dissenting in *Abrams v. New York*, 250 U.S. 616, 624 (1919) about “free trade in ideas,” the “best test of truth” as found “in the competition of the market,” and “all life is an experiment,” since “every year if not every day we have to wager salvation upon imperfect knowledge.” Compare those eloquent remarks with what James said in 1897 about the “freest competition” of faiths in “the market place;” the “survival of the fittest” among them as the result of their “vying with one another”; and their freest public expression constituting “experimental tests” which are “the only means by which their falsehood or truth can be established.” James, *Preface to THE WILL TO BELIEVE AND OTHER ESSAYS IN POPULAR PHILOSOPHY* 11, 12 (1897).

In 1895, James said: “So far as man stands for anything, . . . his entire vital function may be said to have to deal with maybes. Not a victory is gained, not a deed of faithfulness or courage is done, except upon a maybe. . . . It is only by risking our persons from hour to hour that we live at all.” *JAMES, IS LIFE WORTH LIVING?* (1895) reprinted in *THE WILL TO BELIEVE* 32, 59 (1897).

In 1882, James said: “Faith means belief in something concerning which doubt is still theoretically possible, and as the test of belief is willingness to act, one may say that faith is the readiness to act in a cause which is not certified in advance. . . . In the total game of life we stake our persons all the while.” *JAMES, THE SENTIMENT OF RATIONALITY* (1882) reprinted in *THE WILL TO BELIEVE* 63, 90, 94 (1897). As to “experiment” and “risks” in the realm of morals, see also *JAMES, THE MORAL PHILOSOPHER AND THE MORAL LIFE* (1891) reprinted in *THE WILL TO BELIEVE* 184, 206–207 (1897).

In 1909, Holmes wrote of the “struggle for life among our ideas,” and repeated this notion in 1913. See Holmes' papers reprinted in *HOLMES, COLLECTED PAPERS* at 288, 299 (1920).

Both James and Holmes, vis a vis the competition of ideas through free speech, were influenced by *JOHN STUART MILL, LIBERTY* (1859) which in turn was influenced by Milton's *AREOPAGITICA* (1644). Holmes' dissenting opinion in the *Abrams* case appeared on November 10, 1919. On February 28, 1919, Holmes wrote Laski that he had just reread Mill's *LIBERTY*; 1 *HOLMES-LASKI LETTERS* 187 (1953).

In 1870, Chauncey Wright, a disciple of Mill, wrote of Bain's idea about beliefs, and combining it with the idea of evolution, spoke of the “survival of the fittest”

True, as applied to science, the idea of prediction, of verifying, testing, an hypothesis by its consequences, was in the air. In 1865, Chauncey Wright said that "one of the leading traits of modern scientific research is" the "reduction of ideas to the test of experience. . . . [W]hen and however ideas are developed, science cares nothing, for it is only by tests of sensible experience that ideas are admitted into the pandects of science . . . science asks no questions about the ontological or *a priori* character of a theory, but is content to judge it by its performance."<sup>88</sup> The reader will recall Peirce's reference to prediction. For Holmes' prediction theory, says Wiener, "the great progress of the physical . . . sciences had prepared the way."<sup>89</sup> But, before Holmes, no one had applied the prediction idea in the legal realm.

#### IV

Holmes' prediction theory he first adumbrated in 1872, when he wrote of "law in the more limited meaning which lawyers give to the word," calling it "lawyers' law." Such "law," he asserted, is "possessed" of no "other common attribute than of being enforced by the procedure of the courts, and therefore of practical importance to lawyers. . . . It is not the will of the sovereign that makes lawyers' law, even when that is its source, but what . . . the judges, by whom it is enforced, say is his will. The judges have other motives for decision, outside their own arbitrary will, besides the commands of their sovereign. And whether those other motives are, or are not, equally compulsory, it is immaterial, if they are sufficiently likely to prevail to afford a ground for prediction. The only question for the lawyer is, how will the judges act?"<sup>90</sup>

In his *Common Law* (1881), Holmes suggested that, to understand the "law" on a certain subject, we should "look at the law as it would be regarded by one who had no scruples against doing anything which he could do without incurring legal consequences. . . ."<sup>91</sup>

To these themes he recurred, amplifying them, in 1897.<sup>92</sup> He then told law students that when "we study law," we "are studying what we shall want in order to appear before judges, or to advise people in such a way as to keep them out of court. . . . The object of our study, then,

---

among a man's beliefs. WRIGHT, *LIMITS OF NATURAL SELECTION* (1870) reprinted in WRIGHT, *PHILOSOPHICAL DISCUSSIONS* 97 at n. 115 (1876).

Incidentally, compare Holmes' "clear and present danger" test with MILL, *LIBERTY* c. 3, first paragraph (1859) as to an inflammatory opinion when "delivered orally to an excited mob"; see also c. 2, first footnote, as to the utterance of an idea by which a government is assailed, if followed by an overt act.

88. WRIGHT, *THE PHILOSOPHY OF HERBERT SPENCER* (1865) reprinted in WRIGHT, *PHILOSOPHICAL DISCUSSIONS* 41, 47 (1876).

89. WIENER, *op. cit. supra* note 9, 174.

90. 6 AM. L. REV. 593 (1872). (Emphasis added).

91. *THE COMMON LAW* 317. At 110, he said: "A man may have as bad a heart as he chooses, if his conduct is within the rules." See also 214.

92. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457 (1897), reprinted in HOLMES, *COLLECTED LEGAL PAPERS* 167 (1920).

is prediction, the prediction of the incidence of the public force through the instrumentality of courts. . . . The primary rights and duties with which jurisprudence busies itself . . . are nothing but prophesies." A "legal duty so-called is nothing but a prediction that if a man does or omits certain things he will be made to suffer in this or that way by judgment of the court. . . . If you want to know the law and nothing else, you must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict. . . . What constitutes the law? You will find some text writers telling you that it is something different from what is decided by the courts of Massachusetts or England, that it is a system of reason, that it is a deduction from principles of ethics or admitted axioms or what not, which may or may not coincide with the decisions. But if we take the view of our friend, the bad man, we shall find that he does not care two straws for the axioms or deductions, but that he does want to know what the Massachusetts or English courts are likely to do in fact. I am much of his mind. The prophesies of what courts will do in fact, and nothing more pretentious, are what I mean by the law." What does "the notion of legal duty . . . mean to a bad man? Mainly . . . a prophecy that if he does certain things he will be subjected to disagreeable consequences by way of imprisonment or compulsory payment of money."<sup>93</sup>

There are many who contend that here Holmes had in mind not predictions of particular decisions in any particular cases but solely predictions of the legal rules, or other like generalizations, which the courts would use in deciding those cases. Typically, Patterson remarks, "The 'prophesies' that Holmes referred to were the *generalized* predictions of legal rules and doctrines from which the *individualized* predictions of the legal counselor are derived."<sup>94</sup> I think such an interpretation untenable, since it flatly contradicts what Holmes actually said. "A bad man," he stated, wants a prediction as to whether, if he does a contemplated act, he will or will not suffer "imprisonment or compulsory payment of money" by the "judgment of a court." Surely that statement cannot mean that the client wants a "generalized" prediction of some legal rule. For such a generalization, as Holmes put it, the client "does not care two straws." According to Holmes' plain words, the client desires to be advised, in advance, of the outcome,

93. In 1918, Holmes wrote that "for legal purposes a right is only the hypostasis of a prophecy—the imagination of a substance supporting the fact that the public force will be brought to bear upon those who do things to contravene it—just as we talk of the force of gravitation accounting for the conduct of bodies in space." Holmes, *Natural Law*, 32 HARV. L. REV. 42 (1918) reprinted in HOLMES, COLLECTED LEGAL PAPERS 310 at 313 (1920).

94. PATTERSON, JURISPRUDENCE 121 (1953). (Italics as in the original.) This is the way Holmes' idea was used by John Chipman Gray, Cardozo and many (not all) of the so-called "legal realists."

As to Gray's error, see, e.g., LERNER, THE MIND AND FAITH OF JUSTICE HOLMES 368 (1943).

the consequences, of a specific future law suit to which he may be a party, to have a prediction that in such a suit he will win or lose, so that he can know in advance of acting whether or not a court will decide to jail him or make him pay damages. Such specific predictions constitute Holmes' definition of "law"—"lawyers' law" as he had previously labelled it.

Fisch appropriately describes Holmes' prediction theory as legal pragmatism. Indeed, Fisch declared in 1942 that, Holmes' 1872 and 1897 papers are "the only systematic application of pragmatism that has yet been made," that "the method of the practicing lawyer" expressed in that theory "had much to do with the origins of philosophical pragmatism," and that either "the prediction theory was developed by applying that doctrine to the special case of law, or, . . . more likely, . . . pragmatism was a generalization of the prediction theory of law."<sup>95</sup> Holmes encapsulated his pragmatism in the pragmatic statement in 1899 that "a generalization is empty so far as it is general. Its value depends on the number of particulars it calls up for the speaker and hearer"; and again when he said in his dissenting opinion in *Lochner v. New York*, 198 U. S. 45 (1905), that "General propositions do not decide concrete cases."<sup>96</sup> (But Holmes would have agreed with Pekelis that "concrete cases cannot be decided by general propositions—nor without them.")<sup>97</sup>

Since Holmes was a pragmatist, who considered a "generalization" as "empty so far as it is general," his own generalization about predictions should be tested pragmatically by observing its practical operations in respect of particular law suits. As Felix Cohen insisted, "If you want to understand something, see how it works."<sup>98</sup> One should then ask, "Does Holmes' prediction theory work 'in action' in specific cases? Can lawyers predict most future specific decisions?" The great majority of Holmes' adherents have answered yes. They regard rules as efficient "instruments of prediction."<sup>99</sup> When the theory did not seem to work, one or the other of these adherents explained that it was the formal legal rules which were at fault as prediction-instruments. They declared that the theory could be made workable by resort (1) to "real rules" (discoverables lurking behind the "paper" or formal rules), or

95. Fisch, *Justice Holmes, The Prediction Theory of Law and Pragmatism*, 39 J. OF PHIL. 85, 87, 89, 94 (1942).

Fisch suggests that Holmes' 1872 paper antedated, by several months, the paper Peirce read to the Metaphysical Club, but Fisch concedes that Peirce, although in a less complete manner, had previously formulated the ideas there expressed. See Fisch, 39 J. OF PHIL. at 93 and note 20 (1942).

96. Holmes, *Law in Science and Science in Law*, 12 HARV. L. REV. 443, 460-461 (1899), reprinted in HOLMES, COLLECTED LEGAL PAPERS 211, 240 (1920).

97. PEKELIS, LAW AND SOCIAL ACTION 20 (1950).

98. Cohen, *The Problems of a Functional Jurisprudence*, 1 MOD. L. REV. 5, 8 (1937).

99. See GARLAN, LEGAL REALISM AND JUSTICE 5 (1941).

(2) to the mores or the policies embodied in the formal rules, or (3) behavioristically, to the economic or social "forces" which mold the decisions and which can be generalized (i.e., formulated as "rules"),<sup>100</sup> or (4) to the judges' "value patterns" which reflect "group-enforced value patterns" and which can be ascertained and expressed as generalizations, or (5) to the social and economic backgrounds of the judges as modified by their respect for professional (generalized) standards.<sup>101</sup>

Doubtless, within fairly wide limits, by means of one "ruly" device or other, moderately accurate prophesies of particular decisions do prove possible—*provided* one confines one's attention solely to upper-court decisions, which, for the most part, turn on rules applied to facts already determined in the trial courts whose decisions are appealed.

But more than twenty years ago, I tried, pragmatically, to apply Holmes' prediction theory to future specific decisions of trial courts. If such decisions could not be prophesied, then usually lawyers' prophesies would be of comparatively little worth, since very few trial court decisions are appealed and the upper courts affirm most of those that are appealed. So I enquired whether, before suits commenced, lawyers usually could, with some high degree of accuracy, foretell the specific decisions of the trial courts, in particular cases, i.e., whether the lawyers could predict, before suits began, that in particular cases the plaintiffs would win or lose, and, if they won, what the amounts of the judgments would be. The amounts are, of course, usually what interests clients: if they recover but a few dollars, they will seldom be satisfied. Defendants in civil suits also want to know what, if they lose, will be the amounts of the judgments against them. Most defendants in criminal actions are eager to know whether they will be convicted and too, if so, what their sentences will be.

I discovered that this sort of prophesying was markedly uncertain. Why? Briefly stated, these are the reasons: Most law suits are, in part at least, "fact suits." The facts are past events. As they happened in the past, those facts do not walk into the court room; they do not occur in the presence of the trial court. The trial judge or jury, endeavoring (as an historian) to learn those past events, must rely, usually, on the oral testimony of witnesses who say they observed those events. The several witnesses usually tell conflicting stories. This must mean that at least some of the witnesses are either lying or (a) were honestly mistaken in observing the past facts or (b) are honestly mistaken in recollecting their observations or (c) are honestly mistaken in narrating

100. For an ambitious behavioristic program of prediction, based on neurology, see Northrop, *Underhill Moore's Legal Science: Its Nature and Significance*, 59 *YALE L.J.*, 196 (1950).

101. For a discussion and criticism of these several devices, see Frank, "*Short of Sickness and Death*": *A Study of Moral Responsibility in Legal Criticism*, 25 *N.Y.U.L. REV.* 545 (1951).

their recollections at the trial. The trial court must make up its mind as to which of the witnesses tells a reliable, "credible," story. That is, the trial court (judge or jury) must select some part of the conflicting testimony to be treated as reliably reporting the past facts. In each law suit, that choice of what is deemed reliable testimony depends upon the unique reactions of a particular trial judge or a particular jury to the particular witnesses who testify in that particular suit. This choice is, consequently, discretionary: The trial court exercises "fact-discretion." Its exercise may result in the trial court's erroneous determination of the past facts. Yet the decision of the case usually turns upon its determination of those facts. No one has ever contrived any rules (generalized statements) for making that choice,<sup>102</sup> for exercising that fact-discretion. It therefore lies beyond—is uncapturable by—rules, and it is "unruly." Being unruly, it is usually unpredictable before the law suit commences.

The exercise of the trial courts' fact-discretion involves a reaction to the "demeanor" of the witnesses while they testify in the trial court room. This "demeanor evidence" cannot be reported in the printed or typewritten record which alone is available to the upper court, if the trial courts' decision is appealed. On that account, the upper courts in most cases accept the trial courts' "unruly" fact-findings, i.e., the trial courts' exercise of its fact-discretion remains, ordinarily, unreviewable, final, undisturbed. We thus have what has been called the "sovereignty" of the trial court, since the "facts" it "finds" will usually control the decision even on appeal. From all this it follows that, because the way the trial courts' fact-discretion will be exercised in most cases is usually not guessable before the law suits began, most trial court decisions—and, accordingly, most upper court decisions—are similarly not guessable at that time, i.e., previous to the commencement of suit. Lawyers can often (not always) make fairly accurate guesses as to what rules the courts will apply in uncommenced law suits. The difficulty lies in guessing to what facts the courts will apply those rules. Only in a modest minority of cases is that element of the decisions foreseeable. Therefore, seldom can a "bad" man or a "good" man obtain from his lawyer the sort of prophesy Holmes' theory envisioned. The weakness of his theory is illuminated by Judge Learned Hand's remark: "I must say that, as a litigant, I should dread a law suit beyond almost anything else short of sickness and death."<sup>102a</sup>

The foregoing represents but a sketch of a complex subject.<sup>103</sup> How-

102. For a brilliant discussion of that theme, see STEPHEN, *THE INDIAN EVIDENCE ACT* (Introduction on the Principles of Judicial Evidence) 41-43 (1872). See also MAINE, *VILLAGE COMMUNITIES* 317-18 (4th ed. 1881).

102a. Hand, *The Deficiencies of Trials to Reach the Heart of the Matter*, 3 LECTURES ON LEGAL TOPICS 89, 105 (1926).

103. For more detailed expositions, see, e.g., the following of my own articles: Frank, *Are Judges Human?*, 80 U. OF PA. L. REV. 17, 233 (1931); *What Courts*



ever, it will suffice to show the shakiness of Holmes' prediction theory. For the most part, that theory succumbs to what I call "fact scepticism."

If you agree with that conclusion,<sup>104</sup> must you also conclude that Holmes' emphasis on predictions of decisions was useless, pragmatically futile?<sup>105</sup> Not at all. To advance a theory which, when tested, proves unworkable may be the best kind of pragmatism: It may reveal theretofore disregarded matters of prime importance. Think how the failure of the Michelson-Morley experiment led to the Einstein theory. With-

---

*Do to Facts*, 26 ILL. L. REV. 645, 761 (1932); *Mr. Justice Holmes and Non-Euclidean Legal Thinking*, 17 CORNELL L.Q. 568 (1932); *Cardozo and The Upper Court Myth*, 13 LAW & CONTEMP. PROB. 369 (1948); *COURTS ON TRIAL* (1949) *passim*; *Modern and Ancient Legal Pragmatism*, 25 NOTRE DAME LAW. 207, 460 (1950); "Short of Sickness and Death," 26 N.Y.U.L. REV. 545 (1951).

In several of these writings, reference is made to other "unruly" elements in trials, including these: the honest witnesses' unconscious prejudices; missing or destroyed evidence; the inscrutable and unpredictable unconscious prejudices and "gestalts" of trial judges and jurors.

The brief statements in the text of the present article as to "fact discretion," and as to the acceptance by upper courts of trial court "findings" of fact, are over-simplified. For necessary qualifications, see Frank, "Short of Sickness and Death," 26 N.Y.U.L. REV. 545, 564, 571-572, 583, 587-588, 592-593 (1951).

I have elsewhere suggested that Aristotle, because of his greater familiarity with trials and their "unruly" elements, was a far better legal pragmatist than Dewey and many of Dewey's disciples. See Frank, *Modern and Ancient Legal Pragmatism*, 25 NOTRE DAME LAW. 207, 460 (1950).

104. For substantial agreement, see e.g., PATTERSON, JURISPRUDENCE 187-188, 298, 544-545, 567, 590 (1953); Stone, Book Review, 63 HARV. L. REV. 1466 (1950).

105. There is some indication that, at least at times, Holmes turned his back on the "unruly" elements. In 6 AM. L. REV. 733 (1872) he discussed Austin's statement of the "motives" for decisions, such as "a doctrine of political economy, or the political aspirations of the judge, or his gout." Holmes commented: "The judges have other motives for decision, beside the commands of their sovereign, and whether those motives are, or are not equally compulsory is immaterial, if they are sufficiently likely to prevail to afford a ground for prediction. The only question for the lawyer is, how will the judges act. Any motive for their action, be it a constitution, a statute, a custom, or precedent, which can be relied upon as likely in the generality of cases to prevail, is worthy of consideration as one of the sources of the law, in a treatise of jurisprudence. Singular motives ". . . are not a ground of prediction, and are therefore not considered."

In short, according to Holmes in 1872, such "unruly" factors as the unique, concealed, or unconscious "motives" of a particular trial judge should not be considered—because, being "singular" (i.e. unique) they interfere with decision-prediction! See FRANK, *COURTS ON TRIAL* 178 (1949).

It should be noted that in the same year that Holmes published his article, there appeared Stephen's Introduction to the Indian Evidence Act.

It may be that Holmes' rejection of such "unruly" elements, see note 102 *supra*, especially in respect of trial court "fact finding," stemmed from the fact that Holmes had little interest in such fact-determinations. One who knew well both Holmes and Brandeis wrote me the other day (1) that Brandeis had said Holmes was to be avoided as a single trial judge in Massachusetts; and (2) that Holmes had often remarked, "I do not know facts, I merely know their significance." Holmes, in 1930, wrote me much to that effect.

That he did recognize that most decisions turn on the trial courts' determinations of the facts, see THE COMMON LAW 115 (1881): "In most cases the question is upon the facts, and it is only occasionally that one arises on the consequences." See also 124, 125.

out that magnificent failure, disclosing errors in previous seemingly well-established theories, recent progress in physics would have been impossible. Holmes' prediction theory put up to legal thinkers a crucial question they had theretofore by-passed. As Felix Cohen provocatively said, in 1937, "The most significant advances in intellectual history are characterized by the focusing of critical attention upon facts and issues which were formerly considered unimportant, indecent, or self-evident. . . . [T]he enduring contributions of new schools of thought have not been the new theories they have defended, which have more often than not turned out to be erroneous, but the new questions they have put."<sup>106</sup>

The multitude of "unruly" factors which block predictions of most trial-court decisions are also the very factors which account for the many court-house tragedies resulting from mistaken trial-court fact-findings: Because of such mistakes, innocent men have gone to jail or have been hanged, and other men required to pay ruinous judgments for sums which, were the true facts found, they did not owe. I repeat (because this fact has been obscured) that the gross inadequacies of present trial-court fact-finding methods which render decision-predictions hazardous also yield those tragedies. Some of those inadequacies are irremediable. But others can be eliminated.<sup>107</sup>

If the negative answer to the question raised by Holmes' prediction theory, so far as it relates to trial-court decisions, leads to reforms which will eradicate the sadly deficient but remediable aspects of trial-court "fact-finding,"<sup>108</sup> then that theory will have been a blessing, and Holmes' pragmatism will have won another signal moral victory. I deliberately call it a "moral" victory, because of the charge that the pragmatists, including Holmes and his followers, have cold-shouldered morals and noble ideals, a ridiculous charge refuted by their writings and their deeds.<sup>109</sup>

106. Cohen, *The Problems of a Functional Jurisprudence*, 1 MOD. L. REV. 5, 6 (1937).

See DE MORGAN, A BUDGET OF PARADOXES (1872): "Wrong hypotheses, rightly worked from, have produced more useful results than unguided observation."

107. The subject of this paragraph is dealt with, at length, in Frank, "Short of Sickness and Death," 26 N.Y.U.L. REV. 545 (1951).

As to the need to recognize the existence of the irremediable inadequacies, see also FRANK, COURTS ON TRIAL 3, 35, 47, 50-51, 61, 79, 88, 89, 99, 185, 222, 424-426 (1949).

108. Some of such reforms are suggested, most tentatively, in FRANK, COURTS ON TRIAL (1949), *passim*; see summary at 422-423.

One of those suggestions (c. 17) is that judges, especially trial judges, should, as law students, be trained in psychology, and should each, with psychiatric aid, engage in intensive self-exploration. Green, in 1872, writing of The Punishability of Children, said: "One might infer, *a priori* perhaps, that a bench of judges trained in dry technical reasons and a jury of shopkeepers versed wholly in the business of practical every day life, would be as unfit a tribunal as could be selected for the purpose of judging the processes of the infant mind." GREEN, ESSAYS ON TORT AND CRIME 170, 179-180 (1933).

109. For refutations of this charge, see, e.g., WIENER, *op. cit. supra* note 9, 198-200; PATTERSON, *op. cit. supra* note 12, 482-486, 494-500, 504-506, 552; Kessler,

To avoid misunderstanding, this must be added: It would be the gravest error to say that Holmes' theory did no more than to stimulate proposed reforms of trial methods. For his statement of his theory contained novel insights which induced revised attitudes towards many other matters legal, including, *inter alia*, the following: (1) A rejection of the narrow idea that it is solely "the will of the sovereign that makes lawyers' law."<sup>110</sup> (2) A renewed recognition of the distinction (observed by Aristotle centuries ago)<sup>111</sup> between "law in books" and "law in action." (3) A deflation of extravagant expectations concerning the efficacy of "social control" through legislation, without abating the understanding that extensive legal changes must come from legislatures rather than courts. (4) Repudiation of "self-evident truths" as the bases of court decisions; the substitution of non-Euclidean legal thinking,<sup>112</sup> with a concomitant increased awareness by judges of the unstated (theretofore concealed) policy considerations involved in judge-made legal rules and doctrines, and a consequent greater judicial willingness to alter those legal generalizations in the interest of justice. All these pragmatic effects of Holmes' theory represent distinct moral gains.

Nor does "fact-scepticism"—which stemmed from testing Holmes' prediction theory pragmatically—point merely to reforms in trial methods. In revealing that in many instances trial court "findings" of the "facts" are inherently subject to unresolvable doubts, and that often mistakes in such "findings" cannot be avoided, this scepticism should, among other things, persuade us to make humane changes in the administration of criminal justice, such as abolition of the death sentence and increased stress on the "individualization" of punishment.

---

*The Theoretic Bases of Law*, 9 U. OF CHI. L. REV. 98, 109 (1941); Kessler, *Natural Law Justice and Morals*, 19 TULANE L. REV. 32 (1944); cf., the following of my own writings: *Mr. Justice Holmes and Non-Euclidean Legal Thinking*, 17 CORNELL L.Q. 568, 562 (1932); *If Men Were Angels*, 297-299 (1942); *A Plea for Lawyer-Schools*, 56 YALE L.J. 1303, 1322-1323 (1947); *LAW AND THE MODERN MIND*, Preface XXVI-XXVII (6th printing 1949); *COURTS ON TRIAL* 2, 32, 35, 80-112, 218-219, 364-365, 371, 385-391, 425-426; "Short of Sickness and Death," 26 N.Y.U. L. REV. 545 (1951) *passim*. See, above all, FELIX S. COHEN, *ETHICAL SYSTEMS AND LEGAL IDEALS* (1931); Felix S. Cohen, *The Problems of A Functional Jurisprudence*, 1 MOD. L. REV. 5, 25-26 (1947).

110. I think Holmes' use of the ambiguous word "law" was unfortunate, since it has provoked endless futile arguments by critics, each of whom has his own different pet definition of that leaky word.

I once (in 1930) made a similar blunder which I soon (in 1931) repented. I discovered the wisdom of shunning the term "law," replacing it by a direct statement of the subject I was discussing, i.e., (1) what courts actually do, (2) what they are supposed to do, (3) whether they do what they are supposed to do, and (4) whether they should do what they are supposed to do. See Frank, *Are Judges Human?*, 80 U. OF PA. L. REV. 17, 45 (1931); FRANK, *IF MEN WERE ANGELS* 279-284 (1942); Preface to Sixth Printing (1949) of FRANK, *LAW AND THE MODERN MIND* 6 (1930); FRANK, *COURTS ON TRIAL* 3, 66-67 (1949).

111. See ARISTOTLE, *RHETORIC*; Frank, *Modern and Ancient Legal Pragmatism*, 25 NOTRE DAME LAW. 485-493 (1950).

112. See Frank, *Mr. Justice Holmes and Non-Euclidean Legal Thinking*, 17 CORNELL L.Q. 568 (1932).

Moreover, fact-scepticism transcends the legal realm. It raises, for instance, a serious question about the worth of much history-writing, with its cock-sureness as to the "facts" of history, whether of the distant or very recent past. As many of the "facts" reported by historians are dubious, historical generalizations—so-called "laws" of history and "lessons of history"—necessarily become extremely shaky. If the trial judge is an historian who ought to acknowledge the inescapable dubiety of many of his reconstructions of the past,<sup>112a</sup> so too should many a professional historian, as a "judge of the dead" (and the living), become less irresponsible<sup>113</sup> in declaring that he knows just what happened and why, and in asserting that his interpretations of history represent highly reliable means for either predicting or guiding the future.<sup>114</sup>

## APPENDIX

### Proximate and Remote Cause†

*In jure non remota causa, sed proxima, spectatur*, is the first of Lord Bacon's "Maxims of the Law."

An unsuccessful search for this maxim has been made in the civil law. It does not appear to have been used in the English law prior to Lord Bacon's time. As he plainly intimates that some of the maxims were original with him, this was probably one of that number.

In the 82d and following Aphorisms of the "De Augmentis," he says, "a good and careful treatise on the different rules of law conduces as much as any thing to the certainty thereof. . . . The collection should consist, not only of the common and well known rules, but of others likewise, more subtle and abstruse, which may be gathered from the harmony of laws and decided cases, such as are sometimes found in the best tables of contents: and are in fact the dictates of reason, which run through the different matters of law, and act as its balance. . . . After a rule has been stated in a concise and solid form of words, let examples . . . be added. . . . It is a sound precept not to take the law from the rules, but to make the rule from the existing law."

112a. See Frank, *Say It With Music*, 61 HARV. L. REV. 921, 923, 943-947 (1948); FRANK, COURTS ON TRIAL 37, 156 (1949); *In re Fried*, 161 F.2d 453, 462 n. 21 (2d Cir. 1947).

113. Some professional historians, especially in writings intended to be read by other professional historians, are not thus irresponsible.

114. See, e.g., FRANK, FATE AND FREEDOM (1945) *passim*.

† This article, by Nicholas St. John Green, was first published (unsigned) in 4 AM. L. REV. 201 (1870) and reprinted in GREEN, ESSAYS ON TORT AND CRIME 1 (1933).

The article was cited in *Laidlow v. Savage*, 158 N.Y. 73, 99-100 (1899). See also *Salsedo v. Palmer*, 278 Fed. 92, 96 (2d Cir. 1921). See *Johnson & Co. v. S. E. C.*, 198 F.2d 690, 697 n. 18 (2d Cir. 1952); *Hentschel v. Baby Bathinette Corp.*, 215 F.2d 102, 106 (2d Cir. 1954) (dissenting opinion).

And in the Preface to the rules or maxims, for he calls them by both names, he says, "whereas these rules are some of them ordinary and vulgar, that now serve but for grounds and plain songs to the more shallow and impertinent sort of arguments; others of them are gathered and extracted out of the harmony and congruity of cases, and are such as the wisest and deepest sort of lawyers have in use, though they be not able many times to express and set them down."

But whether the maxim be original with Bacon or not, it is from him that it derives its authority. It is said to be a maxim of general application. It is employed by the courts as an authoritative rule in cases of maritime insurance, in actions for negligence, and when it is sought to determine the defendant's liability for damages. In such cases it is often used with a different meaning, and receives a different application from any intended by Lord Bacon. What Lord Bacon meant by it can be plainly shown.

It was the chief object of Bacon's study and labor to point out that the methods of investigating truth, then and before his time in vogue, were erroneous. It was his further aim to teach what he considered to be a new and true method. It was his opinion that the investigation of truth is a search for causes. Philosophers of all ages have held the same opinion. All philosophy rests upon causation.

The method of philosophizing, prior to Bacon, was by an assumption of first principles, which led for its result to nothing but vague speculation. Bacon's aim was to teach a vigorous analysis, in each instance, for the purpose of discovering the proximate cause. From that alone, in his opinion, can a true and certain inference be made. In this opinion, as to the necessity of the proximate cause for accurate reasoning, he was not at variance with Aristotle and the schoolmen.

That it was the proximate cause (whatever that may be) with which his philosophy was to deal, he has asserted in no doubtful terms.

In the 2d Aphorism of the 2d book of the "*Novum Organon*," he says, "It is a correct position that true knowledge is knowledge by causes." He adopts Aristotle's division of causes. "And causes again are not improperly distributed into four kinds: the material, the formal, the efficient, and the final." He confines all philosophy to the search for the proximate cause. These are his words: "But of these, the final cause rather corrupts than advances the sciences, except such as have to do with human action. The discovery of the formal is despaired of. The efficient and the material (as they are investigated, that is as remote causes) are slight and superficial, and contribute little if any thing to true and active science." That is, he leaves nothing for the investigation of science, but the proximate cause as distinguished from the remote.

That he intended to include the law with the other sciences which were to be investigated by the proximate cause, is shown by the 127th Aphorism of the 1st book of the "*Novum Organon*." After having generally enounced his method of induction and its application to philosophy, he says, "It may also be asked (in the way of doubt rather than objection) whether I speak of natural philosophy only, or whether I mean that the other sciences,

logic, ethics, and politics should be carried on by this method. Now I certainly mean what I have said to be understood of them all, and as the common logic which governs by the syllogism extends not only to natural, but to all sciences, so does mine also which proceeds by induction embrace every thing."

In the 8th book of the "De Augmentis," he treats of law, among other sciences, the investigation of which is to be conducted by his method of inquiry.

Taking that view of causes which Lord Bacon did, what is more natural than that, when framing maxims which, according to his own account, were the commencement of the application of his system of philosophy to that particular science, he should commence by asserting that doctrine which he regarded as the cornerstone of all philosophy; that in law, as in every thing else, proximate and not remote causes were the proper objects of inquiry? He expresses the groundwork of his philosophy in a single sentence. He places the maxim in its proper position as the first, the introduction to the others. There is a significance in the first words, "*In jure.*" He had, in other places taught that the neglect of the remote and the search for the proximate cause was the key to all science. Now, when treating of a particular science, he reasserts it in regard to that science.

The maxim then, as used by Bacon, is but the assertion of the general principle of philosophical inquiry. He uses the word cause in the broad signification which it has in the writings of Aristotle and his commentators the schoolmen, that is, as nearly synonymous with the word reason.

The examples cited by him by way of illustration, prove this. They show that the law deals with definite reasons, and is not led into uncertain speculation. They are no authority for the maxim as now commonly used.

But is not the maxim capable of a more exact application? What is the precise thing which is a proximate cause to be searched out, and what is the precise thing which is a remote cause to be neglected in true philosophical reasoning?

Bacon adopts Aristotle's classification of causes, but the agreement between them is deeper than this.

Aristotle, in his "Organon,"<sup>1</sup> says, "there is a difference between knowing *that* a thing is, and knowing *why* it is, and the science of the *why*, has respect to '*τὸ πρῶτον αἰτιῶν*'" or the proximate cause,—*causa proxima*, as it is translated by the schoolmen;<sup>2</sup> thus agreeing with Bacon in the "Novum Organon," that true knowledge is knowledge by causes, and that knowledge by causes, is knowledge by the proximate cause.

This and parallel passages in Aristotle are the foundation for the scholastic division of causes into proximate and remote. What do the schoolmen mean by this division? Stripped of technical language and verbal refinement, it is this: A proximate cause is one in which is involved the idea of necessity. It is one the connection between which and the effect is plain and intelligible; it is one which can be used as a term by which a

1. POST ANALYTICS, Book 1, c. 13.

2. ZABARELLAE OPERA 416 b. 835 f.

proposition can be demonstrated, that is, one which can be reasoned from conclusively.<sup>3</sup>

A remote cause is one which is inconclusive in reasoning, because from it no certain conclusion can be legitimately drawn. In other words, a remote cause is a cause the connection between which and the effect is uncertain, vague, or indeterminate. It does not contain in itself the element of necessity between it and its effect. Marsilius Ficinus<sup>4</sup> says, "From the remote cause the effect does not *necessarily* follow." This idea of necessity—the necessary connection between the cause and the effect—is the prime distinction between a proximate and a remote cause. The proximate cause being given, the effect must follow. But although the existence of the remote cause is necessary for the existence of the effect (for unless there has been a remote cause there can be no effect), still the existence of the remote cause does not necessarily imply the existence of the effect. The remote cause being given, the effect may or may not follow. "Nam posita causa remota non ponitur effectus, sed ipsa remota removetur."<sup>5</sup>

The schoolmen agree in saying that a knowledge of the proximate cause is a knowledge of the *δύοτι*, the *propter quid*, the reason why. They agree in saying that there can be no demonstrative reasoning but by the proximate cause. Averroes, the most famous of the Arabian schoolmen, in his Commentary on the Post Analytics,<sup>6</sup> says, "It is necessary for demonstration, showing why a thing is, that it should be by a proximate cause."

Petrus Tartaretus<sup>7</sup> says, "The demonstration why a thing is, proceeds by a proximate cause."

Sebastianus Contus<sup>8</sup> says, "The knowledge why a thing is, is gained by a proximate cause."

Albertus Magnus says the appearance of a comet is the remote cause of war and famine. The immediate cause, which is used as synonymous with proximate cause, is the quarrel from which the war began. In the Middle Ages there was but one mode of adjustment for the disputes of princes, and as surely as war followed disagreement, so surely did devastation follow war, and famine devastation.

3. Duæ sunt Demonstrationis species. Prima, quæ demonstrat *ὅτι*, sive *Quod res sit*; probando, vel simpliciter et directe *rem ita esse*, et tum vocatur *Ostensiva*, seu potius *Directa*; vel si *non sit*, absurdi aliquid necessario secuturum. . . . *Ostensiva Directa* fit duobus modis.

1. Quando aliquid demonstratur per *Effectum*; ut si *diceres*; *Luna Soli opposita nigra cernitur*; ergo *patitur Eclipsin*. 2. Quando per *Causam remotam*; ut si idem colligeres quia *Sol et Luna diametraliter opponuntur*. Quod si illud demonstrares per *Causam proximam*, quia nempe *Terra inter Solem et Lunam interponitur*, tum fieret.

Secunda Demonstrationis species *Διότι*, i.e. quæ docet *Quare*, vel *Propter quid res sit*; causam ejus assignando, non quamcunque, sed *proximam* seu *immediatam*. Sic enim statuunt Logici quod *Scientia* omnis est *Cognitio rei per causam*, sed *proprie dicta* per *propriam*, h. e. *proximam*; nam per remotam *Cur sit* aliquatenus ostenditur; nihil amplius quam *Quod sit* demonstratur.

ALDRICH, ARTIS LOGICÆ RUDIMENTA 118 (Mansel's 3rd edition).

4. THEOLOGICA PLATONICA, Book 9, c. 4.

5. JOANNES VESOR, QUÆSTIONES SUPER NOVAM LOGICAM, i. An. Post.

6. Lib. 1, c. 2, comment. 30.

7. EXPOSITIO SUPER TEXTU LOGICES ARISTOTELIS.

8. IN UNIVERSAM DIALECTICAM ARISTOTELIS, 1 Anal. Post, cap. 10.

The scholastic distinction between proximate and remote causes has nothing to do with their relative distance from the effect either in space or time. The schoolmen did not view them as connected together like the links of a chain. The distinction has nothing to do with their retrogression from the effect as long as the effect necessarily follows from the cause. As long as the element of necessity exists in the mind, each cause in the line of causation is called, not strictly a cause, but an instrument of the cause which impels it to action. The last cause, looking backward from the effect, from which the effect, as they say, necessarily follows, is called, proximate cause. Every thing intervening between it and the effect is called an instrument, or is viewed as a part of the execution of the act of causation.

Occam,<sup>9</sup> in treating of the passage above quoted from Aristotle, says distinctly, "By the remote cause is not meant something which is the cause of a cause, or the cause of several causes."

Duns Scotus<sup>10</sup> says, "Dico, quod quicquid est causa causæ est causa causati."

Thomas Aquinas,<sup>11</sup> upon the question whether God is the cause of sin, first states the position of his opponents as follows: "Præ terea, quidquid est causa causæ est causa effectus." Whatever is the cause of a cause is the cause of the effect. But God is the cause of free-will, which is the cause of sin, therefore God is the cause of sin."

His answer is this: "It is to be said that the effect of a middle cause, proceeding from that cause so far as it follows the order of the first cause, is referred to the first cause. But if it proceeds from the middle cause, so far as this departs from the order of the first cause, it is not referred to the first cause. Thus if an agent does something contrary to the mandate of his master, this is not referred to the master as its cause; and similarly sin, which free-will commits against the precept of God, is not referred to God as its cause."

Bacon agrees with the schoolmen when he says, "Also you may not confound the act with the execution of the act; nor the entire act with the last part, or the consummation of the act."

The division of causes into proximate and remote is therefore a division of the schoolmen, founded upon the doctrine of Aristotle, that true knowledge is knowledge of the proximate cause. Those causes which are plainly and necessarily followed by the effect are proximate. Those causes between which and the effect the connection is uncertain or not necessary are remote causes.

In Bacon's time this was common knowledge, and the terms proximate and remote were then used in this sense. The logic of Burgersdyk was the text-book both at Oxford and Cambridge at the time of the first publication of Bacon's works.

Burgersdyk<sup>12</sup> says, "Eighthly, and finally. The efficient cause is divided

9. SUMMA TOTIUS LOGICAE, 2 pt., c. 20.

10. QUAESTIONES SUBTILLISSIMAE IN METAPHYSICAM, Book 5, Question 1, Opera IV, pp. 595 b, 596 b.

11. SUMMA THEOLOGICA, 1st Part of 2d Part, Question 79, Art. 1.

12. INSTITUTIONES LOGICAE, Book 1, c. 17, ax. 34 & 35.



into the proximate and the remote. That is a remote cause which produces its effect immediately. That is a remote cause which produces the effect by means of a more neighboring cause. An efficient cause is said to be in two ways proximate, either generally or specially. A proximate cause is said generally to be next whenever it is joined to the effect either in existence of (*virtute*) power. For such (*virtus*) power being an instrument of the principal cause is considered together with the principal to be but one cause only. And therefore when the principal cause by its power is joined to the effect, it is itself considered as joined to the effect. Neither does it make any difference whether that power be an instrument conjoined or separate. For example, fire is the proximate cause of burning, parents of their children, notwithstanding fire acts by the mediation of heat, and parents of semen. For though heat and semen are instruments, yet they do not prevent, by their intervening, the principal cause from being called the cause proximate to the effect. A cause is said to be remote in this sense, when neither in its existence nor in its power it is joined to the effect. As a grandfather is said to be the remote cause of his grandson." He further says,<sup>13</sup> a cause is said to be accidentally subordinated to another. "In the first place, when it indeed depends upon a superior cause, but does not depend upon it at the time it produces the effect. In this way a father depends upon ancestors in begetting his son, and in this way every proximate cause upon the remote." That is, the remote cause is necessary for the existence of the proximate; but the proximate itself contains the whole causal power, and does not derive it from the remote. Thus if there had been no grandfather, there would have been no grandson; but no power of the grandfather was instrumental in the begetting of the grandson. So, according to Aquinas, if there were no Deity, there would be no sin; but sin is not committed by the agency of the Deity. And, according to Albertus Magnus, the appearance of the comet was ominous of political disturbance; but it did not necessitate the quarrel of princes. The quarrel was not a consequence of it, it was simply foretold by it. But from the quarrel war, and from war famine, followed as necessary consequences. Remote causes, then, are those which, as far as the particular effect concerned, have no causal power.

Eustachius a Sancto Paulo, in his "Summa Philosophiæ Quadripartita,"<sup>14</sup> which was a work well known at the time Bacon wrote, says, "The second division of efficient causes is into proximate and remote. Those are called proximate which proximately and immediately produce the effect; but this is to be understood only of principal causes,—as a father begetting is the cause of the son begotten. But a remote cause is one between which and the effect there intervenes another principal cause, as a grandfather in the relation to the begetting of his grandson." A proximate cause, then, must be a principal cause, and a remote cause must be a cause separated from the effect by a principal cause. But a principal cause is one which contains in itself the whole causation. According to Burgersdyk,<sup>15</sup> "A principal cause is one which produces the effect by its own power." Causal

13. Book 1, c. 15.

14. Part 3, p. 39.

15. Ch. 17, Ax. 18.

necessity, as was before observed, is therefore the chief characteristic of a proximate cause, and the want of it of a remote cause.

The results of the schoolmen's labors will live and exert an influence while speech is necessary to man. They have marked large portions of their philosophy into the modern European languages so deeply, that they can never be eradicated from the human mind while those languages are spoken upon earth. They acquired the subtlety for which they are famous by separating and defining ideas, by making those ideas clear and distinct which had before dwelt in formless confusion in the human mind. To those ideas thus won from confusion they gave names. They thus left them a permanent inheritance for succeeding times. Thanks to their labors a child now in learning to talk becomes possessed, without trouble or effort, of ideas clear and unconfused, the imperfect conception of which once puzzled philosophers. A large proportion of the abstract terms in the English language are derived from the scholastic Latin. The clearness of meaning which they possess is due to the subtleties, the distinction, and the refinements which the schoolmen have crystallized within them. Without their use, Bacon, who, while professing small value for the schoolmen, helped himself from their riches with a liberal hand, could not have written.

They have sent down to us their philosophy upon the question we have been considering, the distinction between a proximate and a remote cause, in a single word. The word cause, in its causal sense, we owe to the schoolmen. From them we derive also the compound word *Because*, which is a contraction of the phrase *By the cause*. Whenever the schoolmen used the simple word cause without qualification from the context, it signified the proximate cause. When now the word *Because* is used correctly to express a logical reason, it points out with much exactness the scholastic proximate cause. Thus we have concentrated into what was formerly a little phrase and what is now a single word, Aristotle's famous distinction of knowledge into the *ὅτι* and the *διότι*, together with the schoolmen's labor in the same direction.

In this manner this division of causes is traced from Aristotle through the schoolmen to Bacon's time. The maxim containing it can mean but this, that if the law is to be perfected as a science, as Bacon hoped it would be, its expounders must deal with what is certain. They must not attempt to draw inferences from inconclusive premises. They must not wander from the point into misty generalities. Thus understood, it is a caution much needed. It is a caution for which, if it were only followed, the practitioners of the law could not be too grateful.

After the publication of the works of Bacon and Descartes, scholastic logic, the credit of which had been much shaken by the revival of learning, and (as the schoolmen generally were the champions of the Romish Church) had been still more shaken by the Reformation, fell rapidly and deeply into disrepute. Its doctrines were not only forgotten, but its name became a byword.

Duns Scotus achieved a fame founded only by the limits of the civilized world. He died in his thirty-fourth year, the intellectual giant of the time. His works in bulk are equal to those of some of the law writers of the

present day, although he does not appear to have written any thing for the sole purpose of swelling their size. They are extant in twelve folio volumes. His clearness, depth, and power of mind would put to blush the bold ignorance of those who speak patronizingly of scholastic subtlety, if happening to possess the capacity to understand logical statement and close reasoning, they should perchance read a page of his writing. He was the greatest of the British schoolmen.

As the followers of Descartes are called Cartesians, and the followers of Kant, Kantians; so, from the name of Duns Scotus, the scholastic logicians were called Dunces. The contempt which came to be entertained for scholastic philosophy is seen in the present meaning of the word.

The oblivion into which scholastic nomenclature sunk is shown by the perplexity of the commentators over Shakespeare's use of the phrase "discourse of reason" in the passage where Hamlet says, "A beast that wants discourse of reason would have mourn'd longer."<sup>16</sup> This, the true scholastic use of the term, was common language in Shakespeare's time. It so appears from the works of Milton, Fuller, Chapman, and a host of the old dramatists. But Gifford thinks Shakespeare could never have written "so poor and perplexed a phrase."

Bearing in mind the disrepute into which the schoolmen fell, it is not perhaps surprising that when several generations after Bacon's time this maxim began to be gradually quoted in the courts, its true meaning, as the enunciation of a general truth, should have been lost sight of. Confusion has resulted from regarding it, not as a general caution, but as a precept susceptible of a special application. It has been used in this manner more frequently in this country than in England. Some American courts seem to have regarded it as particularly applicable to cases of negligence, and in actions of that description have looked upon it as a rule placed in their hands for the purpose of measuring the facts, and saving the jury from trouble.

If the schoolmen took an incomplete view of causation, so also did Bacon. If the incomplete view which they did take was, in fact, erroneous, that error was common to both. They differed not so much as to what causation is, as they did as to the manner of its investigation. The schoolmen assumed their causes. The theologians at the present day, writing upon the same subjects, do the same. Bacon searched for his causes by a system of enumeration of instances and exclusion of foreign causes. Neither method is of practical use. It is impossible to find the art of making gold by blind experiment. It is equally impossible to find it by an enumeration of instances of yellowness, of weight and of ductility. When Bacon gave it as his opinion that it was easier to make silver than to make gold, because silver was the simpler metal, he reasoned like a schoolman, but like a schoolman who had not yet attained to subtlety.

We have seen that Bacon adopts Aristotle's classification of causes, which was also the classification of the schoolmen. This is the formal, the final, the material and the efficient. But this is a grouping together of different things because they have the same name. There is no real, and nothing

16. See Gifford's edition of Massinger's Plays, Vol. I, p. 148.

but a fanciful, similarity between them. The efficient cause alone is the one which is involved in causation. The efficient cause is the cause, which produces effects. Causation is the law of cause in relation to effect. Nothing more imperils the correctness of a train of reasoning than the use of metaphor. By its over free use the subject of causation has been much obscured. The phrase "chain of causation," which is a phrase in frequent use when this maxim is under discussion, embodies a dangerous metaphor. It raises in the mind an idea of one determinate cause, followed by another determinate cause, created by the first, and that followed by a third, created by the second, and so on, one succeeding another till the effect is reached. The causes are pictured as following one upon the other in time, as the links of a chain follow one upon the other in space. There is nothing in nature which corresponds to this. Such an idea is a pure fabrication of the mind.

There is but one view of causation which can be of practical service. To every event there are certain antecedents, never a single antecedent, but always a set of antecedents, which being given the effect is sure to follow, unless some new thing intervenes to frustrate such result. It is not any one of this set of antecedents taken by itself which is the cause. No one by itself would produce the effect. The true cause is the whole set of antecedents taken together. Sometimes also it becomes necessary to take into account, as a part of the set of antecedents, the fact that nothing intervened to prevent the antecedents from being followed by the effect. But when a cause is to be investigated for any practical purpose, the antecedent which is within the scope of that purpose is singled out and called the cause, to the neglect of the antecedents which are of no importance to the matter in hand. These last antecedents, if mentioned at all in the inquiry, are called conditions. Suppose a man to have been drowned. What was the cause of his death? There must have been a man, and there must have been water, and there must have been a coming together of the man and the water under certain circumstances. The fact of there being a man, and the fact of there being water, and each and every attending circumstance, without the presence of which circumstance the death would not have taken place, together with the fact that there was nothing intervening to prevent, constitute the true cause.

What one of the various circumstances necessary to the death we shall single out as the cause, to the neglect of the other circumstances, depends upon the question for what purpose we are investigating the death. For each different purpose with which we investigate we shall find a different circumstance, which we shall then intelligibly and properly call the cause. The man may have committed suicide; we say he himself was the cause of his death. He may have been pushed into the water by another: we say that other person was the cause. The drowned man may have been blind and have fallen in while his attendant was wrongfully absent: we say the negligence of his attendant was the cause. Suppose him to have been drowned at a ford which was unexpectedly swollen by rain: we may properly say that the height of the water was the cause of his death. A medical man may say that the cause of his death was suffocation by water entering the lungs. A comparative anatomist may say that the cause of his death was

the fact that he had lungs instead of gills like a fish. The illustration might be carried to an indefinite extent. From every point of view from which we look at the facts, a new cause appears. In as many different ways as we view an effect, so many different causes, as the word is generally used, can we find for it. The true, the entire, cause in none of these separate causes taken singly, but all of them taken together. These separate causes are not causes which stand to each other in the relation of proximate and remote, in any intelligible sense in which those words can be used. There is no chain of causation consisting of determinate links ranged in order of proximity to the effect. They are rather mutually interwoven with themselves and the effect, as the meshes of a net are interwoven. As the existence of each adjoining mesh of the net is necessary for the existence of any particular mesh, so the presence of each and every surrounding circumstance, which, taken by itself, we may call a cause, is necessary for the production of the effect.

In this view of causation there is nothing mysterious. Common people conduct their affairs by it, and die without having found it beyond their comprehension. When the law has to do with abstract theological belief, it will be time to speculate as to what abstract mystery there may be in causation; but as long as its concern is confined to practical matters it is useless to inquire for mysteries which exist in no other sense than the sense in which every thing is a mystery.

In physical science there is a search for what may with some propriety, perhaps, be called the proximate cause. It is a search for the conditions immediately antecedent to and concomitant with the effect. For instance, it is observed that the limbs of the body apparently move in obedience to the will. The assumption is made that they do actually so move, and the inquiry is for the cause of the movement. The will and the movement are the limits of the investigation. The cause is to be found between those limits. When the inquirer examines the bones and the muscles, and the attachments of the muscles to the bones, he sees a mechanism obviously adapted to produce this effect by the contraction of certain of the muscles. Examining further he finds a connection with the brain and other nervous centres by nervous filaments with which all muscles are provided, which appear to be under the control of the will. From this, in connection with other considerations, he infers that the nervous filaments are the media through which a stimulus is conveyed, and that this is a part of the immediate cause of the voluntary movement. It may be called a part of the proximate cause, since it is invariably present, and the nearest to the effect of any thing which we at present know. But this only raises another question, as to how the will acts upon the nervous filaments. If this should be ascertained to be by the action of the brain, the inquiry would then be in what manner does the brain act. There would also still be the further inquiry as to how the muscles are stimulated to contraction, and the still further one as to how they in fact contract. The inquiry for the cause thus draws closer and closer to the effect without ever finding a true proximate cause. The word proximate therefore, in such an inquiry as this, is not an absolute but a relative term. It signifies the nearest known cause considered in relation to the effect, and in contrast to some more distant cause.

In the law there is no such investigation as this. The law, in the application of this maxim, is not concerned with philosophical or logical views of causation. When the maxim is applied, the whole body of facts has been ascertained by testimony. The facts are the subject of inquiry for a single purpose. That purpose is to determine the rights and liabilities of the respective parties to the proceedings. Those facts alone are viewed as causes and effects which have a direct bearing upon those rights and liabilities. The question is, sometimes, whether a cause is proximate to an effect. Sometimes it is which of several causes is proximate to the effect; sometimes, the question is whether an effect shall be referred to a certain cause as its proximate result; sometimes, it is to which of several causes the effect shall be so referred. These, though different views of the same thing, are often distinct subjects of inquiry. The inquiry is often one of difficulty. The difficulty is not owing to any great ambiguity in the meaning of the word cause. That word is used in its popular signification. One difficulty is, that philosophy and metaphysics are sometimes brought into a discussion to which they do not belong. Another is, that cause and effect are often viewed as parts of a "chain of causation," and the discussion thus becomes meaningless. The chief difficulty, however, is that the term proximate and the term remote have no clear, distinct, and definable significations. Sometimes, causes are decided to be proximate which are remote in time; sometimes those are decided to be proximate which are remote in space. The division is neither scientific nor logical. It is not the scholastic division, though it often has many of its characteristics. Above all, it is not a fixed and constant division. It varies in different classes of actions. The same cause and effect which would be considered proximate in one class of actions, the attendant circumstances being unchanged, would be considered remote in others. The meaning of the terms, proximate and remote, is contracted or enlarged, according to what is the subject-matter of the inquiry.

The maxim, when applied in actions of contract, is essentially a rule of construction. It is the same thing to say a thing comes within a contract as it is to say the contract embraces the thing. It is the same thing to say the loss is a proximate consequence of a peril insured against, as it is to say that the parties intended that such a loss should be covered by the policy. The different forms of expression are one in meaning.

A policy of insurance is a contract of a fixed form. By use its terms have obtained a settled meaning. Its subject-matter is extensive. It is a contract made in the interest of trade. Large amounts of property are covered by policies containing the same stipulations. The contract is one of indemnity. In determining the question, whether a peril insured against was the proximate or the remote cause of a loss; or, what is the same question, whether a loss of that general description was intended by the parties to be covered by the policy, the peculiar nature of a policy of insurance, and the class of interests it covers, are taken into account. The particular intent of the parties is subservient to the public bearing of the question. The terms proximate and remote, in their application to questions of insurance, thus receive in some respects a more enlarged, and in some a more restricted, signification than they have when they are used in giving a construction

to other contracts. But the maxim is as well applicable as a rule of construction for all contracts.

In actions for negligence, a defendant is held liable for the natural and probable consequences of his misconduct. In this class of actions his misconduct is called the proximate cause of those results which a prudent foresight might have avoided. It is called the remote cause of other results.

In determining the amount of damages in an action of contract, the breach of contract is called the proximate cause of such damages as may reasonably be supposed to have been contemplated by the parties. If there are other damages, of those it is called the remote cause.

There is no settled rule for the application of the maxim in determining the damages in actions of tort. In such actions, the damages, which are called proximate, often vary in proportion to the misconduct, recklessness, or wantonness of the defendant.

Our anticipations of the future are founded upon our experience of the past. The experience of the past is the experience of the successions of causes and effects which always surround us. We can estimate, with a reasonable degree of certainty, the probabilities of the future occurrence of many of these successions. About successions of this kind men make contracts. Large classes of such succession can be grouped together, and the order and frequency of their happening can be predicted from past experience with something which approaches to mathematical precision. With events of this kind, underwriters deal. Experience also teaches us that various effects, which we can foresee with a greater or less degree of certainty, will or may follow from our own acts. The law makes us responsible for those effects of our voluntary acts which might reasonably have been foreseen, or which are of a kind analogous to effects which might thus have been foreseen. There is generally no other way of determining whether certain events, or whether events analogous to them in kind, were or might have been anticipated or foreseen, than by an appeal to experience. By applying this maxim, we make that appeal. We determine whether given causes and effects are proximate or remote, in the legal sense of those words, from our own experience of the succession of cause and effect.

The use of the maxim is liable to lead to error by withdrawing the attention from the true subject of inquiry. We cannot add clearness to our reasoning by talking about proximate and remote causes and effects, when we mean only the degree of certainty or uncertainty with which the connection between cause and effect might have been anticipated. But this is an inconvenience which must be submitted to by those who attempt to make a practical application of the maxim.